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IN THE

Supreme Court of the United States

TPI, a/k/a THAI PETROCHEMICAL INDUSTRY PUBLIC COMPANY LIMITED, THAI PETROCHEMICAL LIMITED, THAI PETROCHEMICAL INDUSTRY PCL, TPI OIL (1997) CO., LTD. AND TPI OIL CO. LTD.,

Petitioners,

v.

WINTER STORM SHIPPING, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

At least fifty-two jurisdictions and the Federal Reserve have enacted Article 4A of the Uniform Commercial Code dealing with electronic funds transfers. Electronic funds transfers in dollars must generally pass through the United States, with U.S. banks acting as intermediaries between originating or sending banks and receiving banks. Sections 4A-502 and 4A-503 of the Code address the extent which a court may issue an order to enjoin, attach or otherwise interrupt an electronic funds transfer, holding that an electronic funds transfer may only be interrupted by court process at the originating bank or at the receiving bank, but not at the intermediary bank stage. The Second Circuit Court of Appeals has held in this case that an electronic funds transfer is nevertheless subject to attachment at the intermediary bank stage under Supplemental Admiralty Rule B of the Federal Rules of Civil Procedure, which allows for the service of process of attachment on a defendant's "tangible or intangible property". The Second Circuit has created an exception to the rule against such attachments otherwise in effect in all non-admiralty cases nationwide and even in admiralty cases where the electronic funds transfer passes through the Federal Reserve system.

The question presented is whether a federal district court sitting in admiralty should properly look to state law to determine whether a defendant has property in the district subject to attachment under Supplemental Admiralty Rule B, which does not define what is meant by "property", or does Rule B preempt state law such as the prohibitions of Article 4A of the Uniform Commercial Code against restraining an electronic funds transfer at the intermediary bank stage, where Article 4A provides that a defendant has no property at the intermediary bank stage subject to attachment.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Thai Petrochemical Industry PLC, also named as Thai Petrochemical Industry Public Company Limited, has no parent corporations, but is publicly traded.

Petitioner TPI Oil (1997) Co., Ltd. has as a parent corporation Thai Petrochemical Industry PLC, which is a publicly traded corporation and owns at least 10% of the stock of TPI Oil (1997) Co., Ltd.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion and order (per Scheindlin, D.J.) granting petitioners' motion to vacate the service of process of maritime attachment and garnishment served by the respondent and dismiss the complaint (Appendix ("Pet. App.)" 36a-52a) is published at 198 F. Supp. 2d 385. The court of appeals' opinion (per Haight, D.J., joined by Kearse and McLaughlin, JJ.), vacating the district court's opinion and order (Pet. App. 1a-35a) is published at 310 F.3d 263. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 55a-56a) is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on November 6, 2002, and denied rehearing and rehearing en banc on January 13, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves the intersection of Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, (Pet. App. 57a-60a) the New York State Uniform Commercial Code Sections 4A-502 (Pet. App. 61a-63a) and 4A-503 (Pet. App. 64a), and Federal Reserve System Regulation J, 12 C.F.R. Part 210, *et seq*.

STATEMENT OF THE CASE

Respondent commenced this action in the district court by the filing of a summons and verified complaint and sought to obtain jurisdiction over petitioners by means of service of process of maritime attachment and garnishment on a third party garnishee, pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. Respondent invoked the district court's admiralty and maritime jurisdiction pursuant to Rule 9(h) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") and 28 U.S.C. § 1333.

With the filing of its complaint, Respondent simultaneously applied for and obtained an order for the issuance of process of maritime attachment and garnishment pursuant to Fed. R. Civ. P. Supplemental Rule B(1). As none of the petitioners was subject to the *in personam* jurisdiction of the district court, respondent sought to cause the petitioners to appear by serving the process of attachment upon several garnishees thought to have custody of property of the petitioners. The garnishees identified in the process were Chase Manhattan Bank, Citibank and, as is relevant for this case, The Bank of New York (hereinafter "BONY"). On three occasions on June 28, 2001, and on two occasions again on June 29, 2001, respondent served BONY with copies of a Process of Maritime Attachment and Garnishment in this litigation. The Process had been signed on behalf of the Clerk of the Court of the Southern District of New York and directed BONY, as well as Chase Manhattan Bank and Citibank, as garnishees, to attach "Property, letters of credit, deposits, funds, credits, bills of lading or other assets of whatever form of TPI, a/k/a/ Thai Petrochemical, Industry Public Company Limited, Thai Petrochemical Industry PCL, TPI Oil (1997) Co., Ltd. and TPI Oil Co. Ltd." up the amount of $361,621.58.

Respondent served the Process upon BONY at 10:30am, 12:19pm and 4:44pm on June 28, 2001, and at 12:50pm and 1:45pm on June 29, 2001. In response to the Process, BONY promptly conducted a search of its records, which revealed that BONY was the custodian of no property or assets of TPI, a/k/a/ Thai Petrochemical, Industry Public Company Limited, Thai Petrochemical Industry PCL, TPI Oil (1997) Co., Ltd. and TPI Oil Co. Ltd. at the times of the service of the Process. As a result of one or more of the five services of the Process, however, and not later than the close of business on the afternoon of June 29, 2001, BONY placed a stop order on any funds relating to TPI, a/k/a/ Thai Petrochemical, Industry Public Company Limited, Thai Petrochemical Industry PCL, TPI Oil (1997) Co., Ltd. and TPI Oil Co. Ltd. passing through BONY in New York.

At all relevant times from June 28, 2001, to July 3, 2001, Bank Ayudhya Public Company Ltd. of Bangkok, Thailand, maintained an account with BONY in New York. At 6:48am on July 2, 2001, BONY received a payment order in respect of an electronic funds transfer in the amount of $1,085,071.41 by Bank Ayudhya, as the originating bank, on behalf of Thai Petrochemical Industry Public Co. Ltd., as sender, to the account of Oppsal Shipping Co., Ltd., as beneficiary, at The Royal Bank of Scotland P.L.C. in London. The transfer was by means of the SWIFT system, wherein Bank Ayudyha employed BONY in New York City as the intermediary bank between it and The Royal Bank of Scotland.

Because of the stop order placed as a result of the service of the Process of Maritime Attachment and Garnishment, BONY refrained from immediately executing the payment order that would have completed the electronic funds transfer from Bank Ayudhya to The Royal Bank of Scotland. Instead,

BONY placed $361,621.58 from the account of Bank Ayudhya in a suspense account and issued a payment order in the amount of the balance of $723,449.83 to the account of Oppsal at The Royal Bank of Scotland. Respondent served BONY with additional copies of the Process of Maritime Attachment and Garnishment beginning at 10:59am on July 2, 2001, by which time BONY had already placed the restrained funds, which had previously been on deposit in the account of Bank Ayudhya, into the suspense account.

In the ordinary course of business, BONY would have executed the payment order well before the next service of process, which occurred at 10:59am on July 2, 2001. BONY interrupted the transfer was interrupted only because of the service of process by respondent prior to the initiation of the electronic transfer and thus restrained an amount equal to the demand in respondent's complaint and in the Process.

The district court subsequently granted petitioners' motion to vacate the attachment and dismiss the complaint for lack of personal jurisdiction, holding that petitioners had no property in the custody of BONY subject to attachment. The court noted that Rule B, which allows for the exercise of jurisdiction over a defendant by means of the plaintiff's attachment of the defendant's "tangible or intangible property" in the district, does not define what is meant by the term "property." It also observed that no federal rule had been established as to whether a process of maritime attachment could be served upon an intermediary bank acting on an electronic funds transfer. The district court went on to follow the admiralty rule previously enunciated by the Second Circuit in *Reibor Int'l, Ltd. v. Cargo Carriers (KACZ-CO.), Ltd.*, 759 F.2d 262, 266 (2d Cir. 1985), that in the absence of a controlling federal maritime rule, a federal court sitting in admiralty may properly look to state law to fashion a suitable

admiralty rule. The district court consequently looked to New York State law, as embodied in Article 4A of the Uniform Commercial Code (hereinafter "UCC"). The district court concluded that Sections 4A-502 and 4A-503 of the UCC hold that at the intermediary bank stage an electronic funds transfer does not constitute the property of the sender and prohibit the attachment at the intermediary bank stage. The district court observed that application of Article 4A promoted "the proper harmony and uniformity of maritime law" in that fifty-two jurisdictions had enacted Article 4A of the UCC, and the Federal Reserve had enacted Article 4A by regulation to govern electronic funds transfer to and from Federal Reserve Banks.

Upon respondent's appeal, a panel of the Second Circuit vacated the judgment of the district court, holding that federal law preempted state law on electronic funds transfers, and that under Rule B electronic funds transfers were attachable property. The court of appeals disagreed with the district court that there was no guiding rule in federal law, relying upon the case of *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), which had dealt with the arrest *in rem* of certain funds on deposit by the Department of Justice pursuant to the Drug Abuse Prevention & Control Act, 28 U.S.C. §§ 801, *et seq.* The court of appeals held that under its prior decision in *Daccarett*, electronic funds transfers were indeed subject to maritime process such as attachment at the intermediary bank stage. The court of appeals then went to hold that Rule B preempted New York State law as embodied in Article 4A of the UCC insofar as Article 4A purported to prohibit attachment of a funds transfer at the intermediary bank stage. On January 13, 2003, the Court of Appeals issued its order denying petitioners' motion for rehearing and rehearing en banc.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

The Court should grant the instant petition for the following reasons. First, the case presents a novel question regarding the interplay of federal maritime and state law. Second, despite the novelty of the issue herein, the decision of the court of appeals is in conflict with holdings of this Court and the courts of other circuits regarding the constitutional issue that a federal court must look to state law for the definition of the term "property" where an applicable federal law does not define the term. Third, the decision of the court of appeals warrants immediate review because it has created for certain maritime actions an exception to a rule of law in effect in virtually every other factual scenario, an exception that would work considerable hardship to the banking industry and, in particular, could hamper the ever increasing number of electronic funds transfers that pass through the United States.

I. This Case Presents a Novel Question Regarding the Interplay of Federal Maritime and State Law

This Court in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), held that issuing a writ of certiorari was appropriate where a maritime case "presented novel questions as to the interplay of state and maritime law." 365 U.S. at 733. The instant case presents a novel question as to the interplay between Supplemental Admiralty Rule B and Article 4A of the Uniform Commercial Code. Whereas Rule B allows a maritime plaintiff to serve process of attachment upon the tangible or intangible property of a defendant not otherwise subject to the district court's jurisdiction, Article 4A, which has been enacted by no fewer than 52 jurisdictions and the Federal Reserve, holds that a party has no property interest

in an electronic funds transfer ("EFT") at the intermediate bank stage that could be subject to attachment. Both the district court and court of appeals were in agreement that there was little, if any, federal case law on point as to whether a maritime plaintiff could properly serve process of maritime attachment upon an electronic funds transfer. That little, if any, case law has addressed this specific issue has been likely due to the prohibitions in Article 4A. In light of the court of appeals' decision in this case rejecting the Article 4A rule in cases of maritime attachments, however, it is likely that a significant increase in the practice will result, burdening both the banking system and the federal courts with additional Rule B actions, if the court of appeals decision is allowed to stand.

II. The Court of Appeals' Holding Conflicts With Prior Decisions of This Court And Other Circuits on the Rule Requiring a Federal Court to Look to State Law to Define "Property" Where Federal Law Is Silent

The federal courts have consistently held that, where a statute does not define what is meant by "property," the court should instead look to state law to determine whether a party has a property interest capable of being attached.

This Court stated in *Barnhill v. Johnson*, 503 U.S. 393 (1992), a decision arising in a bankruptcy proceeding, that "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." *Id.* at 398 (citing *Butner v. United States*, 440 U.S. 48, 54 (1979)). The Court was addressing whether a certain payment by check constituted a transfer of the debtor's property within the preference period of 11 U.S.C. § 547(b). Although the Bankruptcy Code defined the term "transfer", it did not define "property". The Court looked to state law as embodied in

the Uniform Commercial Code to determine whether the funds represented by the check would have been considered the property of the debtor within the preference period.

In *Union Planters National Bank v. World Energy Systems, Assoc.*, 816 F.2d 1092 (6th Cir. 1987), the Sixth Circuit conducted a similar analysis in a maritime case to determine whether a purported Rule B attachment had reached any property of the defendant. Judgment creditors with a maritime claim had served a purported attachment upon an advising bank acting upon a letter of credit under which the judgment debtor had been the beneficiary. The Sixth Circuit, relying upon a decision of the Southern District of New York, held that the Rule B attachment must be vacated because the debtor did not have a property interest in the letter of credit at the time of the service of the process of attachment. 816 F.2d at 1098. The Southern District of New York case on which the Sixth Circuit had relied was *Dialan Love, S.A. v. Al-Haddad Bros. Enterprises, Inc.*, 584 F. Supp. 782 (S.D.N.Y. 1984), where the court had specifically held that an attachment served upon the advising bank had to be vacated because, under Article 5 of the Uniform Commercial Code, the defendant did not have a property interest in the letter of credit at the time of service of the process.

In addition to this Court's holding in cases involving the Bankruptcy Code, the rule that a federal court should look to state law for a definition of what constitutes property also has been applied to the Internal Revenue Code, *Don King Productions, Inc. v. Thomas*, 945 F.2d 529, 534 (2d Cir. 1991), the Foreign Sovereign Immunities Act, *Brenntag International Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 252-53 (2d Cir. 1999); and the Ship Mortgage Act,

Chase Manhattan Services, Inc. v. McMillian, 896 F.2d 452, 460 (10th Cir. 1990).

Just as in the Bankruptcy Code, the Internal Revenue Code, the Ship Mortgage Act and the Foreign Sovereign Immunities Act, Supplemental Admiralty Rule B(1) does not define what is meant by the term "property", so that the court of appeals necessarily should have looked to state law. Had the court of appeals looked to state law to determine whether petitioners had any property interest in the electronic funds transfer, it would have been compelled to rely upon Article 4A of the Uniform Commercial Code. Instead, the court of appeals turned to a prior decision decided under the Drug Abuse Prevention & Control Act, 28 U.S.C. §§ 801, *et seq.* (hereinafter "the Drug Act"), a statute inapplicable in a maritime action between private litigants. The federal case on which the court of appeals relied was its earlier decision in *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993). The court of appeals' reliance on *Daccarett* as a source of applicable federal law was incorrect because the case had not been decided under the court's admiralty jurisdiction, but rather had been before the court under the Drug Act, a federal statute that empowers the U.S. government to seize proceeds traceable to illicit drug transactions. In contrast to Rule B, however, the Drug Act defines what the U.S. Department of Justice may seize, including, among other things,

> All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable

> instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

28 U.S.C. § 881(a)(6). Although, at the time *Daccarett* was decided, Section 881(b) as written went on to authorize the U.S. Attorney General to employ the Supplemental Rules for Certain Admiralty and Maritime Claims merely as a procedural device to effect the seizures, the statute did not grant any authority to or create any right or cause of action for private party litigants in a civil action.

As the district court quite properly recognized (Pet. App. at 43a), the mere fact that the Department of Justice may seize funds at any bank as long as the funds have some "traceable connection to an illegal transaction in controlled substances" under the Drug Act, *Daccarett*, 6. F.3d at 54, bears no relevance to whether an EFT is property subject to attachment in a civil action brought by a private litigant. A private litigant in a purely civil action, such as respondent in this case, has available none of the rights or remedies afforded by the forfeiture statutes, but instead may rely only upon Rule B itself. As stated above, Rule B does not define property, so that a federal court sitting in admiralty must look to state law to determine what constitutes attachable property. *See, e.g., Union Planters National Bank*, 816 F.2d at 1098; *Ferrostaal Metals Corp.*, 652 F. Supp. at 424-25; *International Marine Consultants, Inc. v. Karavias*, 1985 WL 1515, at *4-5 (S.D.N.Y. 1985) (not officially reported) (applying New York corporate law to vacate a Rule B attachment because certain freights were not the property of a named defendant); *Dialan Love*, 584 F. Supp. at 785-86; *see, also, Brenntag International Chemicals, Inc.*, 175 F.3d at 252-53 (employing state attachment law to determine whether letter of credit was attachable within the meaning of the Foreign Sovereign Immunities Act).

III. The Court of Appeals' Decision Contravenes the Federal Goals of Uniformity in the Maritime Law and in the Banking System and, as a Result, Presents an Unworkable Hardship for the Banking Industry

The court of appeals' decision, contrary to the maritime law's unquestioned goal of uniformity and the federal courts' favoring of uniformity within the banking system, has carved out a narrow exception to the general rule in effect throughout the country that a claimant may not serve process of attachment upon an intermediary bank acting on an electronic funds transfer. Moreover, the court of appeals' decision inadvertently creates a division within the law of Rule B maritime attachments, because the Panel's decision applies only to funds transfers that do not use the Federal Reserve's FEDWIRE[1] system. The court of appeals' overlooked the fact that the Federal Reserve has adopted Article 4A of the Uniform Commercial Code *en toto as part of federal law* for all FEDWIRE transfers, including the prohibition against interruption of EFTs at the intermediary bank stage. Federal Reserve System Regulation J, 12 C.F.R. Part 210, *et seq.* The court of appeals reached this result, contrary to its previous exhortations in *Reibor International, Ltd. v. Cargo Carriers (KACZ-CO), Ltd.*, 759 F.2d 262, 267 (2d Cir. 1985), against establishing divergences between state attachment law and admiralty attachment law, particularly in New York.

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1. Three major electronic transfer systems are in operation in the U.S., including the FEDWIRE system operated by the various Federal Reserve banks. The other two major systems, which are purely private, are the SWIFT system, through which the EFT at issue in this case passed, and the CHIPS system, operated by the New York Clearing House Association.

As this Court stated over 125 years ago, one of the primary goals of the Constitution's grant of admiralty jurisdiction to the federal courts in Article III was to achieve uniformity in the maritime law. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). More recently, this Court has stated that when deciding a maritime case, a federal court must consider "the proper harmony and uniformity of maritime law." *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994). Even the court of appeals had previously stressed the importance of "consistent nationwide application of Rule B." *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 48 (2d Cir. 1996). Indeed, in adopting Article 4A as part of federal law, the Federal Reserve made clear that one of its primary goals was uniformity in the law applicable to EFTs. 55 Fed. Reg. 40792 (Oct. 5, 1990).

The court of appeals' decision in this case, however, means that two different rules will apply to the purported Rule B attachments of EFTs at the intermediary bank stage, depending on which EFT system is employed by the sender's bank. For FEDWIRE transfers, a Rule B attachment is invalid at the intermediary bank stage because U.C.C. Sections 4A-502 and 4A-503 apply as a matter of federal law. Under the court of appeals' holding, however, an attachment served on an intermediary bank operating within private systems such as the CHIPS or SWIFT system could still be valid.

Moreover, as respondent has conceded, at least 52 jurisdictions have enacted Article 4A. "The fact of the nationwide acceptance of the Uniform Commercial Code is of no small significance to a court exercising its admiralty jurisdiction when so much of the lore of federal admiralty law stresses uniformity." *S.C. Loveland, Inc. v. East West*

Towing, Inc., 415 F. Supp. 596, 610 (S.D. Fla. 1976), *aff'd*, 608 F.2d 160 (5th Cir. 1979); *see also Woodward Governor Co. v. Curtiss-Wright Flight Systems, Inc.*, 164 F.3d 123, 129 (2d Cir. 1999) (stating that the application of the Uniform Commercial Code promotes federal law's interest in uniformity). Consequently, in virtually any state court action the purported attachment of an EFT at the intermediary bank stage would be invalid. Similarly, in light of Federal Rule of Civil Procedure 64, under which a district court adopts the attachment rules of the state in which it sits, any federal court attachment in a non-maritime case would be invalid. The Panel's holding thus drives a wedge between Fed. R. Civ. P. 64 and Rule B, which will lead to inconsistent results under each rule.

If the Panel's decision stands, therefore, one set of rules will apply to Rule B attachments of EFTs through the SWIFT and CHIPS systems, while the opposite rule will apply to Rule B attachments through the FEDWIRE system, as well as to all non-maritime actions, including those in state courts and those in federal courts sitting in diversity or hearing issues of non-maritime federal law. Such a situation would undoubtedly contravene prior exhortations against establishing

> disruptive divergences between state attachment law and admiralty law. Freeing garnishees from the burden of keeping track of yet another difference between state attachment law and admiralty attachment law has value in and of itself.

Reibor, 759 F.2d at 267. Intermediary banks therefore would be presented with the prospects of making determinations as to which types of process of attachment they must enforce

and which ones they may disregard, all within a matter of the few moments between receipt of the payment order issued by the originating bank and the moment they must issue their own payment order to the beneficiary bank. The consequences of such a rule could wreak havoc with the banking system, where efficiency of the execution of the volume of payments orders on electronic funds transfers requires promptness.

The potential deleterious effect on the banking industry was set forth concisely, yet in detail, in the briefs submitted in support of petitioners' petition for rehearing in the court of appeals by *amici curiae* the New York Clearing House Association, LLC, and the Federal Reserve Bank of New York. The New York Clearing House, operator of the CHIPS system, argued that the court of appeals' decision would inhibit the free flow of funds among financial institutions and could give rise to additional federal litigation against intermediary banks because of the uncertainty involved in each funds transfer. The New York Federal Reserve pointed out how the application of the court of appeals' decision could interrupt the flow of funds through Federal Reserve Banks, because of the uncertainty of whether Regulation J would be superseded by the application of Rule B. Petitioners respectfully submit that these compelling concerns, especially in light of the court of appeals' divergence from authority of this Court and of other circuits, merits issuance of a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons, the instant Petition for writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED NOVEMBER 6, 2002

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2001

(Argued: June 3, 2002 Decided: November 6, 2002)

Docket No. 02-7078

WINTER STORM SHIPPING, LTD.,

Plaintiff-Appellant,

-against-

TPI, a/k/a THAI PETROCHEMICAL INDUSTRY PUBLIC COMPANY LIMITED, THAI PETROCHEMICAL LIMITED, THAI PETROCHEMICAL INDUSTRY PCL, TPI OIL (1997) CO., LTD. AND TPI OIL CO. LTD.,

Defendants-Appellees

Before: KEARSE, McLAUGHLIN, *Circuit Judges*, and HAIGHT, *District Judge*.*

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* The Honorable Charles S. Haight, Jr., of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

HAIGHT, Senior District Judge:

Winter Storm Shipping, Ltd. ("Winter Storm") appeals from the January 11, 2002 Opinion and Order, 198 F. Supp. 2d 385, and the January 16, 2002 Judgment of the District Court for the Southern District of New York (Shira A. Scheindlin, *District Judge*) vacating a maritime attachment of funds of defendants TPI, a/k/a Thai Petrochemical Industry Public Company Limited, Thai Petrochemical Industry PCl, TPI Oil (1997) Co., Ltd. and TPI Oil Co. Ltd. (collectively "TPI") in the hands of garnishee Bank of New York ("BNY") and dismissing Winter Storm's complaint for lack of jurisdiction over TPI. This appeal, involving the interplay between a centuries-old admiralty law procedure and present day banking technology, poses the question whether funds involved in electronic fund transfer ("EFT") between banks are subject to attachment under Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims. The district court answered in the negative. We vacate the judgment of the district court and remand the case to that court with instructions to reinstate the attachment and retain jurisdiction.

BACKGROUND

Winter Storm, a foreign corporation with a place of business in Malta, chartered its vessel M/V NINEMIA to defendant-appellee TPI, a Thai corporation, to carry an oil cargo from Rabigh, Saudi Arabia, to Rayong, Thailand, in February and March, 2001. Winter Storm claims that TPI breached the charter party by failing to pay the full freight due and owes Winter Storm $361,621.58, an amount that

includes interest and anticipated attorneys' and arbitrators' fees. The charter party provides for arbitration of disputes in London.

Winter Storm filed a complaint against TPI in the district court on June 21, 2001, and an amended complaint on June 26, 2001 (hereinafter the "complaint"), characterizing its claim as admiralty and maritime in nature under Rule 9(h), Fed. R. Civ. P., and invoking the district court's admiralty jurisdiction conferred by 28 U.S.C. § 1333. The complaint described the charter party of the NINEMIA, the voyage performed, and TPI's failure to pay the full freight, and asserted that "plaintiff has, or will shortly, nominate its arbitrator pursuant to the arbitration clause set forth in the contract of charter." A-10.[1]

Winter Storm further alleged that TPI could not be "found within this District" within the meaning of Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure (the "Admiralty Rules") and sought an order directing the Clerk to issue process of maritime attachment and garnishment pursuant to Rule B and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, 8 attaching TPI's assets held by garnishees in the amount of $361,621.58.

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1. The district court's opinion states that "[b]oth parties have now appointed arbitrators, and the arbitration is proceeding." 198 F. Supp. 2d at 386.

Appendix A

Admiralty Rule B(1) provides:

> (a) If a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process.

The process of attachment prayed for by Winter Storm identified "Chase Manhattan Bank and/or Bank of New York" as potential garnishees.

Section 8 of the FAA, 9 U.S.C. § 8, which Winter Storm invoked in addition to Admiralty Rule B, makes maritime attachment available to parties to a maritime contract, such as a charter party, which contains an arbitration clause. The statute provides:

> If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Appendix A

The district court entered its *ex parte* order of attachment on June 22, 2002. Process of maritime attachment and garnishment was served upon BNY at 12:19 p.m. and 4:44 p.m. on June 28, 2001, and at 12:50 p.m. and 1:45 p.m. on June 29. At those times BNY did not hold any funds of TPI. However, as a result of these services of process BNY "not later than the close of business on June 28, 2001, placed a stop order on any funds relating to [TPI] passing through" BNY. Affidavit of David Rosenfield ("Rosenfield affidavit"), BNY's Manager—Legal Process and Senior Counsel, A-33.

TPI maintained an account with a Thai bank in Bangkok, the Bank of Ayudhya ("BA"), which in turn maintained an account at BNY. TPI entered into an unrelated commercial transaction with Oppsal Shipping Co., Ltd. ("Oppsal"), which maintained an account with the Royal Bank of Scotland in London ("RBS"). TPI's contract with Oppsal called for TPI to pay Oppsal in United States dollars. At 6:48 a.m. on July 2, 2001, BNY received from BA a payment order in respect of an EFT in the amount of $1,085,071.41 on behalf of TPI to the account of Oppsal at RBS. The transfer would be made electronically through BNY in New York City. BA was the originating bank and BNY acted as the intermediary bank.

Because BNY, in response to the earlier services of process of attachment procured by Winter Storm, had placed a stop order on TPI funds that might pass through it, BNY did not immediately execute BA's payment order that would have completed the electronic transfer of $1,085,071.41 by BA to RBS. Instead, BNY "placed $361,621.58 from the account of Bank of Ayudhya in a suspense account and issued a payment order in the amount of the balance of $723,449.83

to the account of Oppsal at The Royal Bank of Scotland." Rosenfield affidavit, A-34. The deducted amount of $361,621.58 represents the total amount of Winter Storm's claims against TPI, as recited in the processes of attachment.

That sum was still anchored in BNY's suspense account when, at 10:59 a.m. on July 2, 2001, BNY was served with an additional process of maritime attachment on behalf of Winter Storm. BNY continued to hold these funds, now in obedience to the process. Had BNY not taken the earlier action of placing a stop order on any TPI funds that might pass through the bank, then "[i]n the ordinary course of business, The Bank would have executed the payment order well prior to the next service of process, which occurred at 10:59 a.m. on July 2, 2001." Rosenfield affidavit, A-35.

In these circumstances, TPI moved in the district court to vacate the attachment of the funds held by BNY in the suspense account. Winter Storm opposed TPI's motion. The district court granted TPI's motion to vacate the attachment and, since the attachment formed the sole basis for jurisdiction *quasi in rem* over TPI, dismissed Winter Storm's complaint for lack of jurisdiction. Judge Scheindlin held that an EFT intercepted at an intermediary bank is not "property" that can be attached under Admiralty Rule B. She reasoned principally that since the Admiralty Rules do not define "property" in this context, and "[t]here is no federal precedent on point," 198 F. Supp. at 388, recourse should be had to state law. That analysis led the district court to § 4-A-503 of the Uniform Commercial Code as adopted in New York, *see* N.Y. U.C.C. Art. 4A (McKinney 1991). Section 4-A-503 deals with court injunctions or restraining

orders with respect to a "funds transfer," and provides that a court may "restrain" only the originator of a payment order (in this case TPI), the originator's bank (here, BA), or the beneficiary's bank (here, RBS). The section concludes: "A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer." The statutory scheme is intended to insulate an intermediary bank in a funds transfer bank from judicial restraint. *See* Official Comment, U.C.C. § 4-A-503 ("This section . . . is designed to prevent interruption of a funds transfer after it has been set in motion[;] . . . [i]n particular, intermediary banks are protected.").

Regarding U.C.C. § 4-A-503 as controlling, the district court vacated Winter Storm's maritime attachment and dismissed its complaint. This appeal followed.

DISCUSSION

I. Standard of Review

We review *de novo* the constructions of the statutes and rules and the conclusions of law upon which the district court based its opinion.

II. The History and Characteristics of Maritime Attachment

Maritime attachment is centuries old. "The use of the process of attachment in civil causes of maritime jurisdiction by courts of admiralty . . . has prevailed during a period extending as far back as the authentic history of those tribunals can be traced." *Atkins v. Fibre Disintegrating Co.*,

85 U.S. (18 Wall.) 272, 303 (1873). As early as 1825, the Supreme Court was able to say of the right of attachment in *in personam* admiralty cases that "[t]his Court has entertained such suits too often, without hesitation, to permit the right now to be questioned." *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 486 (1825). "[M]aritime attachment is a feature of admiralty juris-prudence that antedates both the congressional grant of admiralty jurisdiction to the federal district courts and the promulgation of the first Supreme Court Admiralty Rules in 1844." *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 47 (2d Cir. 1996). Admiralty Rule B, quoted in part *supra*, contains the current provisions governing maritime attachment.[2] "Rule B is simply an extension of this ancient practice." *Aurora*, 85 F.3d at 47-48. A Rule B attachment is available only if the defendant "is not found within the district." "As developed by the courts, a defendant will be considered 'found within the district' in which the plaintiff brings its action if the defendant has sufficient contacts with the district to meet minimum due process standards *and* can be served with process in the district." Robert M. Jarvis, *An Introduction to Maritime Attachment Practice Under Rule B*, 20 Journal of Maritime Law and Commerce, No 4 (October 1989) at 521 (hereinafter "Jarvis").

"The rationale underlying maritime attachment is twofold. First, attachment provides a means to assure

2. Initially the Admiralty Rules were a separate body of rules of practice promulgated by the Supreme Court. On July 1, 1966 the Federal Rules of Civil Procedure and the Admiralty Rules were merged. There are now six lettered "Supplemental Rules" for admiralty and maritime claims which deal with particular aspects of admiralty practice.

satisfaction if a suit is successful"; the second purpose is "to insure a defendant's appearance in an action, an aspect of attachment inextricably linked to a plaintiff's substantive right to recover." *Aurora*, 85 F.3d at 48 (internal citations omitted). *See also Manro v. Almeida*, 23 U.S. (10 Wheat.) at 489. The jurisdiction conferred by a maritime attachment is characterized as *quasi in rem*. *See Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 654 (2d Cir. 1979).

Maritime attachment is available whenever "the plaintiff has an *in personam* claim against the defendant which is cognizable in admiralty. . . . In other words, the plaintiff's claim must be one which will support a finding of admiralty jurisdiction under 28 U.S.C. § 1333." Jarvis, at 526 & n.20.

The property attached need not have a direct connection to the claim sued upon, since Rule B(1)(a), broadly phrased, allows attachment of "the defendant's tangible or intangible personal property," limited only by "the amount sued for." The case at bar is illustrative; TPI's funds attached by Winter Storm in the hands of BNY were generated by a transaction bearing no relationship to the charter party underlying Winter Storm's claim.

III. Due Process

The district court vacated Winter Storm's attachment principally on the ground that U.C.C. § 4-A-503 precluded EFT funds in the hands of an intermediary bank from being regarded as TPI's "property" within the meaning of Admiralty Rule B. But Judge Scheindlin also said that "[p]ermitting wire transfer credits to be attached at unforeseen and

unknown intermediary banks runs contrary to the (minimal) due process accorded maritime defendants." 198 F. Supp. 2d at 391. The district court reasoned that a maritime defendant must be reasonably able to foresee being sued in the United States based on the location of its property, citing *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528, 1536 (11th Cir. 1985) (which relied in turn upon *Amoco*, 605 F.2d 648) and *Engineering Equipment Co. v. S.S. Selene*, 446 F. Supp. 706, 710 (S.D.N.Y. 1978), and "decline[d] to endorse a rule stating that every time a foreign maritime entity initiates a wire transfer abroad, it must foresee attachment in New York and suit in the United States." *Winter Storm*, 198 F. Supp. 2d at 391 n.7. TPI urges this due process theory in resisting Winter Storm's appeal. We address the question first because if Winter Storm's attachment fails to pass constitutional due process muster the district court lacked jurisdiction and no other questions can arise.

We begin by noting that in the early days of American admiralty practice, plaintiffs (or "libelants," in the former parlance) simply obtained processes of maritime attachment from the clerk of the district court, without the participation of a judge. *See Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, vintage 1825, where the Court, upholding the attachment, stated in matter-of-fact fashion that "[t]he clerk, it seems, issued the attachment as process of course," *id.* at 485.[3] That

3. The statement of the case preceding the opinion in *Manro v. Almeida* observed that "[i]t appeared by the admission of counsel at the hearing, that the attachment had been issued by the Clerk of the District Court, as a process of course, without any particular order of the Judge." 23 U.S. (10 Wheat.) at 474.

practice, formerly provided for by Admiralty Rule 2, was continued without substantive change when in 1966, 141 years after the Court decided *Manro v. Almeida*, the civil and admiralty rules were merged and Admiralty Rule 2 became Supplemental Rule B. *See* the Advisory Committee Notes to the 1966 adoption ("[Rule B(1)] preserves the traditional maritime remedy of attachment and garnishment, and carries forward the relevant substance of Admiralty Rule 2."). The Advisory Committee Notes go on to say:

> The former Admiralty Rules did not provide for notice to the defendant in attachment and garnishment proceedings. *None is required by the principles of due process*, since it is assumed that the garnishee or custodian of the property attached will either notify the defendant or be deprived of the right to plead the judgment as a defense in an action against him by the defendant. *Harris v. Balk*, 198 U.S. 215 (1905); *Pennoyer v. Neff*, 95 U.S. 714 (1878). Modern conceptions of fairness, however, dictate that actual notice be given to persons known to claim an interest in the property that is the subject of the action where that is reasonably practicable. In attachment and garnishment proceedings the persons whose interests will be affected by the judgment are identified by the complaint. No substantial burden is imposed on the plaintiff by a simple requirement that he notify the defendant of the action by mail.

(emphasis added). In 1966, then, the perception of the rules drafters was that the original maritime attachment rule posed

no due process jurisdictional problems, and that the notice-by-mail requirement, new to the rule, satisfied the more generalized "modern conceptions of fairness."

That perception underwent something of a sea change "following various non-maritime decisions by the United States Supreme Court which mandated a reconsideration of traditional notions of due process." Jarvis at 523 (citing cases, among them *Shaffer v. Heitner*, 433 U.S. 186 (1977)).

Shaffer, which did not involve a maritime claim, held that *quasi in rem* jurisdiction must satisfy the same due process requirements set with respect to *in personam* jurisdiction in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny. *See Shaffer*, 433 U.S. at 207-12. In *Shaffer*, the Delaware courts' assertion of jurisdiction was premised on the sequestration of stock that was conceptually located in Delaware because it was issued by a Delaware corporation; the Supreme Court reversed, noting, *inter alia*, that the stock was not the subject matter of the litigation and that the underlying cause of action did not relate to the stock. Thus, the constitutional requirement of at least minimal contacts was not met. *Id.* at 213-17.

In *Amoco*, 605 F.2d 648, this Court considered the possible effect of *Shaffer* upon *quasi in rem* jurisdiction based upon the New York attachment statute, made applicable by Admiralty Rule B. Although the underlying claim for breach of charter party was maritime in nature, the validity of the attachment turned solely upon New York law, for reasons explained in *Amoco*, 605 F.2d at 650:

> The attachment was effected under state law, N.Y.C.P.L.R. §§ 6201 *et seq.*, pursuant to Fed. R. Civ. P. Supplemental Rule B (for certain admiralty and maritime claims). By inadvertence, appellees did not also utilize the federal procedure which may be employed "in addition" under Rule B(1). Accordingly, it was incumbent upon them to perfect their state *quasi in rem* jurisdictional base by complying with New York statutory requirements. § 6214.

The *Amoco* court held that plaintiff had complied with the New York attachment statute. 605 F.2d at 652-54. The court then had to deal with defendant's "challenge to the jurisdiction of the court below," based upon "the due process clause as it restricts the assertion of personal jurisdiction through proceedings by attachment." *Id.* at 654. Defendant argued that plaintiff's attachment was invalid under the ruling in *Shaffer*, whose effect the *Amoco* court described:

> *Shaffer* completed the process of supplanting the old doctrine of personal jurisdiction based upon state sovereignty with a newer theory of personal jurisdiction stemming from notions of due process. Under the regime of *Shaffer*, the test of " 'fair play and substantial justice' " that governs in personam jurisdiction controls in rem jurisdiction as well. But this extension of the "fair play" test to the ostensible exercise of jurisdiction over property is not necessarily incompatible with the principle of jurisdiction quasi in rem because the presence of property in a State may bear on the existence

> of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. The real teaching of *Shaffer* is that courts must look at realities and not be led astray by fictions.

Id. at 654-55 (citations and internal quotation marks omitted). Analyzing *Shaffer* from that standpoint, and upholding the validity of the attachment in *Amoco*, the *Amoco* court discerned "several distinguishing [factors]. . . . First, and most notable, is the fact that here, unlike *Shaffer*, the property attached is related to the matter in controversy. Far from being present in New York adventitiously, the freights that were attached were in [garnishee] Poten's accounts in New York pursuant to the Charter Party." *Id.* at 655 (citations omitted). *Amoco* also noted that "the parties to the Charter also specified that arbitration was to take place in New York," an agreement which "carries considerable weight in demonstrating that it is not unfair to require the parties to litigate in the forum in which arbitration was designated to take place." *Id.*

Although the *Amoco* court had said that the validity of the attachment turned solely upon the New York statute,[4] the

4. The district court had taken a different view, holding (as paraphrased by this Court) that "the jurisdiction quasi in rem was governed by traditional admiralty principles and was not, in any event, within the scope of the Supreme Court's recent decision in *Shaffer v. Heitner*, concerning due process limitations on quasi in rem jurisdiction." 605 F.2d at 651-52 (internal citations omitted). The district court did not discuss plaintiff's inadvertent failure to invoke the substantive provisions of Admiralty Rule B, the omission which, as we have noted in text, led this Court to identify the New York attachment statute as the governing law.

court went on to discuss *Shaffer* in the contexts of admiralty jurisdiction and maritime attachment:

> . . . *Shaffer* did not consider assertion of jurisdiction over property in the admiralty context. Because the perpetrators of maritime injury are likely to be peripatetic, and since the constitutional power of the federal courts is separately derived in admiralty, U.S. Constitution Art. III § 2, suits under admiralty jurisdiction involve separate policies to some extent. This tradition suggests not only that jurisdiction by attachment of property should be accorded special deference in the admiralty context, but also that maritime actors must reasonably expect to be sued where their property may be found.

605 F.2d at 655 (citation omitted). While the *Amoco* court found it unnecessary to decide whether, as "[a]t least one district court in another jurisdiction has held," *Shaffer* "does not affect jurisdiction obtained under Admiralty Rule B attachment," it went on to say that "even if the *Shaffer* rule of 'minimum contacts'/'fair play' applies in the realm of jurisdiction by attachment in admiralty, that application must be understood in the light of the special history and circumstances of that unique body of law." *Id.* at 655 n.7 (citations omitted).

Given its procedural circumstances, *Amoco* cannot be regarded as a square holding, one way or the other, on the applicability of *Shaffer*-style due process requirements to maritime attachments. Such indications as may be gleaned

from the opinion seem to point in the direction of subjecting admiralty attachments to less stringent requirements.

A number of district and circuit courts were required to confront head-on the possible effect of *Shaffer* and comparable non-maritime cases decided by the Supreme Court in the 1970s upon maritime attachment under Admiralty Rule B as it existed subsequent to the 1966 merger with the civil rules. Various maritime defendants contended that "Rule B was unconstitutional because it 1) permitted plaintiffs to proceed in an *ex parte* fashion; and, 2) authorized the clerk of the court to grant the plaintiff's attachment request." Jarvis at 523. These constitutional challenges had only limited success. In his 1989 article Professor Jarvis was in a position to say: "Although some of these challenges succeeded at the district court level, every appellate court which had the opportunity to review the constitutionality of Rule B concluded that it was valid," citing as examples *Leonhardt*, 773 F.2d 1528, *Trans-Asiatic Oil, Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984), and *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982).

Notwithstanding the unanimity of the post-*Shaffer* appellate decisions upholding the constitutionality of Admiralty Rule B, the drafters of the rules amended Rule B(1) in 1985 in order to address any possible due process concerns. While the practice of granting maritime attachments on an *ex parte* basis remains, Rule B(1) now requires the plaintiff to appear before a judge to procure an attachment. *See* Rule B(1)(b) ("The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and

garnishment.").[5] The Advisory Committee Notes to the 1985 amendments explain their purpose:

> Rule B(1) has been amended to provide for judicial scrutiny before the issuance of any attachment or garnishment process. Its purpose is to eliminate doubts as to whether the Rule is consistent with the principles of procedural due process enunciated by the Supreme Court (citing cases). Such doubts were raised in *Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd.*, 450 F. Supp. 447 (W.D. Wash. 1978); and *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 552 F. Supp. 771 (S.D. Ga. 1982), which was reversed, 732 F.2d 1543 (11th Cir. 1984). But compare *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982), in which a majority of the panel upheld the constitutionality of Rule B because of the unique commercial context in which it is invoked. . . .

The 1985 amendments to the Admiralty Rules also included an addition to Rule E, which contains general provisions for practice in actions *in rem* and *quasi in rem*. New Rule E(4)(f) provides: "Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be

5. Rule B(1)(c) provides that "[i]f . . . exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment."

vacated or other relief granted consistent with these rules."[6] The Advisory Committee notes explain that "Rule E(4)(f) is designed to satisfy the constitutional requirement of due process by guaranteeing to the shipowner a prompt post-seizure hearing at which he can attack the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings."

It does not appear that any court subsequent to the 1985 amendments has questioned the constitutionality of maritime attachment under Rule B, let alone holding the Rule and the admiralty practice under it constitutionally infirm on due process grounds. In this Circuit *Aurora*, 85 F.3d 44, and *ContiChem LPG v. Parsons Shipping Co., Ltd.*, 229 F.3d 426 (2d Cir. 2000), dealt with Rule B(1) maritime attachments after the 1985 amendments became effective on August 1 of that year. Neither decision evidences any due process concern, and the *ContiChem* court observed with seeming equanimity:

> Although a plaintiff seeking attachment must supply, along with its verified complaint, an affidavit stating that defendant cannot be found within the district, little else is required and there need only be a hearing after the attachment is served. *See* Rule B(1).

229 F.3d at 434. This Court also expressed no due process concerns in *Reibor International Ltd. v. Cargo Carriers*

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6. The quoted provision of Rule E(4)(f) does not apply to certain suits for seamen's wages or to "actions by the United States for violation of any statute of the United States." Rule E(4)(f), last sentence.

(KACZ-CO.) Ltd., 759 F.2d 262 (2d Cir. 1985), where the maritime attachment was procured under the original Admiralty Rule B; *Reibor* was decided in April 1985, four months before the 1985 amendments to Rules B and E became effective.

Due process concerns having been expressed in the case before us, they must be assessed in the light of the 1985 amendments to Admiralty Rules B and E. The district court did not refer to those amendments, and the cases the court cited antedate them. Under the rules as presently worded, process of maritime attachment cannot issue (absent exigent circumstances) unless a judge authorizes the process, and a defendant property owner is entitled to prompt notice of the attachment and a court hearing to test its validity. These amendments were fashioned for the stated purpose of addressing due process concerns. No court has subsequently suggested that the amendments were inadequate to that task.

The practical effect of the district court's analysis is that, in addition to the due process safeguards the 1985 amendments extended to defendants, funds in an EFT can never be subjected to maritime attachment unless the defendant also had specific advance knowledge of the name and address of the intermediary bank. We do not agree that so significant a restriction should be placed upon the traditional admiralty practice of maritime attachment. The use of EFTs, product of the modern electronic age, is widespread in international trade. Banking networks serving global commerce tend to use intermediary banks in the world's financial capitals such as New York, a wholly foreseeable arrangement that this Court noted in *Reibor*,

759 F.2d at 266: "Often, when a person in one foreign country makes a payment in U.S. dollars to someone in another foreign country, the payment clears through New York."

Indeed, the commercial and financial facts in *Reibor* closely resemble those in this case. The Spanish shipper of the cargo the chartered vessel carried to Jordan instructed its Madrid bank to transfer funds to the Canadian charterer's bank in Canada. "These funds passed through New York branch banks to effect the exchange into dollars." 759 F.2d at 264. The shipowner, claiming a breach of charter, served process of maritime attachment on the New York banks, taking the position that the funds in the EFT were property of the charterer and attachable under Admiralty Rule B. The attachments failed because at the time they were served the funds had not yet been transferred to the New York intermediary banks. We discuss *Reibor* in other contexts *supra*, but note for present purposes that *Reibor* voices zno due process concerns in a case where the relevant circumstances are indistinguishable from the present case.

We regard the due process safeguards added by the 1985 amendments to Admiralty Rules B and E as sufficient to satisfy constitutional requirements, and discern in the due process clause no basis for rendering the traditional remedy of maritime attachment inapplicable to electronic transfers of funds familiar to those engaged in international trade and increasingly used by them. Accordingly we hold that when an individual or company transfers funds by means of an EFT, those funds may be subjected to maritime attachment in the hands of an intermediary bank without violating constitutional due process, whether or not the initiator of

the transfer knew which intermediary bank would be used to effect it.

It is true that unlike *Amoco*, the funds of TPI attached in the hands of BNY bore no relationship to the underlying charter party, but maritime attachment has never required such a relationship. In *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, the property attached had nothing to do with the out-of-district defendant's maritime tort. More recently, *ContiChem*, 229 F.3d at 429, and *Aurora*, 85 F.3d at 46, involved the maritime attachment of defendants' bank accounts which, as in the present case, bore no relationship to the underlying claim.

It follows that if TPI's funds involved in the EFT constituted "property" of TPI within the meaning of Admiralty Rule B(1), those funds are subjectto a valid maritime attachment, unless U.C.C. § 4-A-503 requires a different result. To those questions we now turn.

IV. EFT Funds as "Property" for Purposes of Maritime Attachment

In determining whether TPI's funds in the hands of BNY during the implementation of an EFT constituted "property" of TPI for purposes of Admiralty Rule B(1), we confront a question this Circuit left undecided in *Reibor*, 759 F.2d 262.

Plaintiff Reibor chartered its vessel to defendant Cargo, a Canadian company that could not be found within the Southern District of New York. Alleging breaches of charter by Cargo, Reibor served Admiralty Rule B writs of attach-

ment on the New York branches of Manufacturers Hanover Trust Co. ("MHT/NY") and the Royal Bank of Canada ("RBC/NY"). Reibor was attempting to attach funds to be remitted to Cargo under a letter of credit calling for the transfer of funds from the Madrid branch of Manufacturers Hanover ("MHT/Madrid") to the Royal Bank of Canada at Montreal ("RBC/Montreal").

Reibor served two Rule B processes on MHT/NY, one on January 28 and the other on February 8, 1983. But it was not until February 11 that MHT/Madrid instructed MHT/NY to make an interbank transfer to RBC/NY through the Clearing House Interbank Payments System ("CHIPS"), a system for the electronic transfer of funds among member banks through a central computer. Reibor also served a process on RBC/NY at 10:25 a.m. on February 11, but RBC/NY did not receive the CHIPS credit until 2:21 p.m. on that day. A fourth process, served on February 14 or 15, "came too late: RBC/NY had wired the money to RBC/Montreal at 3:22 p.m. on February 11." 759 F.2d at 264.

In these circumstances this Court identified the question on appeal as "the validity of a maritime garnishment served before the garnishee comes into possession of the property to be garnished." 759 F.2d at 263. In other words, the issue was whether a Rule B attachment covers "after-acquired property," that is, property of a defendant coming into the possession of a garnishee after service of process upon the garnishee.

The *Reibor* court concluded that on the question of after-acquired property, "the precedent in federal admiralty law is

so thin that we should turn to state law more directly on point." 759 F.2d at 266. The court found that law in N.Y. C.P.L.R. § 6214(b), as explicated in McLaughlin's Practice Commentary: where the order of attachment is left with a third-party garnishee, "the levy is absolutely void unless the garnishee has some property belonging to the defendant or owes the defendant a debt at the time the order is left with him." N.Y. C.P.L.R. § 7B (McKinney 1980). Applying that state law principle to Reibor's Admiralty Rule B attachments, and given the chronology summarized above, this Court concluded that Reibor's processes were absolutely void.[7]

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7. TPI attempts to bring the present case within this holding in *Reibor* by stressing that when Winter Storm served its first processes of attachment on BNY, the bank did not hold any funds of TPI. Had the BNY bank officer recently read the *Reibor* opinion, he might very well have regarded those first processes as absolutely void, and not placed a "stop order" on any after-acquired TPI funds. In point of fact, however, BNY did place the stop order, perhaps pursuant to some agreement between the bank and its depositors not revealed by the record; and so TPI funds were in the bank's possession when Winter Storm's later processes of attachment were served, thereby satisfying the *Reibor* requirement. TPI may feel aggrieved by BNY's conduct, a question about which we intimate no view, but Winter Storm's actions are entirely blameless; in serving a series of processes its counsel did no more than careful practitioners would do. Professor Jarvis, in his discussion of *Reibor*, observes that "[s]ince the plaintiff normally will not know when the funds will reach the bank, and since the bank may have instructions from the defendant to move the funds to another bank as soon as they arrive, the plaintiff in such a case has no choice but to have process served on the bank in a continuous manner." Jarvis at 536 (footnote omitted). Accordingly this case bears no meaningful resemblance to *ContiChem*, 229 F.3d

(Cont'd)

Appendix A

As an alternative basis for vacating the attachments, both MHT/NY and RBC/NY argued that "a CHIPS credit is not property subject to attachment under the Admiralty Rules." *Reibor*, 759 F.2d at 264. This Court did not reach that question in *Reibor*, preferring to reserve it for "another day when somebody has served a writ of attachment on a bank either after it has received instructions from its forwarding bank to transfer a CHIPS credit but before it has made the transfer, or after it has received a CHIPS credit but before it has transferred any funds related thereto." *Id.* at 268-269. With the present case, that day has dawned.

As *Reibor* indicates, while "Federal law generally governs questions as to the validity of Rule B attachments," 759 F.2d at 265, state law may be borrowed if there is no federal admiralty law in point on the particular question presented. In support of this practice the *Reibor* court cited *Det Bergenske Dampskibsselskab v. Sabre Shipping Corp.*, 341 F.2d 50 (2d Cir. 1965), an earlier example in this Circuit of looking to state law for guidance with respect to the effect of a maritime attachment. In *Reibor* the particular question

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(Cont'd)

426, upon which TPI places an unjustified reliance. In *ContiChem* defendants' funds were in the garnishee bank's possession at the time process of attachment was served only as the result of a tactical course of conduct on plaintiff's part which the court regarded as improper. *See* 229 F.3d at 434 ("We hold that ContiChem improperly attempted to circumvent the rule against attachment of property not yet in Unibank's possession" in several different ways). We need not recount the various improprieties in which the *ContiChem* plaintiff indulged; it is sufficient for present purposes to say that Winter Storm did nothing questionable.

presented was whether a writ of maritime attachment covered after-acquired property. In *Bergenske* the question was whether a writ of maritime attachment served on a branch office located in the Eastern District of New York was effective to attach a bank account at a branch office of the same bank located in the Southern District. The *Bergenske* court, while declaring that "[t]his argument must be dealt with according to federal law," also observed that "there is no established admiralty doctrine on this question, such as would reflect a predominant federal interest," and accordingly turned to state cases holding that "accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch, or agency of the bank." 341 F.2d at 52-53 (citations omitted).

Reibor and *Bergenske* demonstrate that in order to decide whether TPI's funds involved in the EFT constituted TPI's property under Admiralty Rule B, we must first determine whether governing federal law provides the answer, in general terms or otherwise; or whether federal law is silent on the particular question presented, so that recourse may appropriately be had to state law. In Judge Scheindlin's view, "[t]he leading Second Circuit case on maritime attachment makes clear that whether a funds transfer at an intermediary bank constitutes property remains unanswered by federal courts," 198 F. Supp. 2d at 389, citing *Reibor.* This overstates *Reibor*, where this Court deliberately refrained from saying anything about that question, rather than explicitly declaring, as did *Bergenske*, that there was no pertinent admiralty law with

respect to the particular question upon which that case turned.[8]

Initially examining admiralty law, as we must, we encounter Rule B(1) itself, which provides that a maritime plaintiff may "attach the defendant's tangible or intangible personal property." It is difficult to imagine words more broadly inclusive than "tangible or intangible." What manner of thing can be neither tangible nor intangible and yet still be "property?" The phrase is the secular equivalent of the creed's reference to the maker "of all there is, seen and unseen."[9] Professor Jarvis has said that

> Rule B also permits a plaintiff to attach intangible items, such as debts owed to the defendant. Such items may be attached even if they have not yet matured or have only partially matured. Of course, the defendant's entitlement to the credit or interest in the debt must be clear.

Jarvis, at 530 (footnotes omitted).[10]

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8. The district court exhibited the same reticence in *Reibor*, stating with respect to "whether a CHIPS credit passing though collecting banks is attachable property within the meaning or Rule B" that "we do not reach this question." No. 83 Civ. 793, 1984 WL 1467, at *2 (S.D.N.Y. July 24, 1984).

9. The quotation is from the Nicene Creed, which may be traced to the Council of Nicea in A.D. 325.

10. Rule B(1)(a)'s reference to "the defendant's tangible or intangible personal property" was contained in amendments to the

(Cont'd)

Appendix A

There is no question that federal admiralty law regards a defendant's bank account as property subject to maritime attachment under Rule B. *See, e.g.*, *Aurora*, 85 F.3d at 46 ("On January 26, 1994, Aurora served [the Hong Kong and Shanghai Banking Corporation Limited] ["HSBC"] with supplemental process of maritime attachment and garnishment under Rule B and attached Fahem's account with HSBC."). Nor are we able to discern in admiralty law or elsewhere a basis for regarding TPI's funds in BNY's hands prior to their electronic transfer to RBS as anything other than funds held by BNY for the account of TPI.

This Circuit has not previously considered in an admiralty case the susceptibility of funds involved in an EFT to attachment under Admiralty Rule B. Unlike the district court, however, we find significant guidance in *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), which involved a civil forfeiture action under federal drug laws. *Daccarett* holds that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statutes." *Id.* at 55. The case is instructive in the admiralty field because the attachments of funds in *Daccarett* were

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Admiralty Rules in 2000; previously Rule B(1) had referred to "the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process . . ." The Advisory Committee Notes characterize the amendment as one of "style changes." The district court perceived no substantive difference between the two versions, 198 F. Supp. 2d at 388 n.2, and neither do we. It is striking, however, that Professor Jarvis's 1989 analysis of Rule B's extension to the "intangible property" of a defendant foretells the 2000 amendments' use of that very phrase.

accomplished pursuant to the Admiralty Rules, incorporated by reference into the forfeiture statute.

The facts in *Daccarett* are as follows. In June 1990 Luxembourg police arrested three associates of the Cali, Colombia drug cartel who had deposited large sums for the cartel in hundreds of European banks. Correctly anticipating that the arrests would trigger efforts by the cartel to move these funds to Colombia before they could be confiscated elsewhere, the Luxembourg authorities requested the assistance of several countries, including the United States, in freezing monies related to the cartel. "During July and August 1990, a flurry of electronic funds transfers from the suspect accounts ensued, resulting in the seizure of . . . $12 million in the United States" which was

> the aggregate of dozens of EFTs sent through New York City intermediary banks that had correspondent banking relationships with Panamanian and Colombian banks. . . . After receiving the subject EFTs, the intermediary banks were supposed to credit the accounts of designated correspondent Colombian banks; the Colombian banks were then supposed to notify the beneficiaries that the funds were available.

6 F.3d at 44.

The United States government interdicted the funds by serving a number of Admiralty Rule C warrants *in rem* upon the New York intermediary banks. The Colombian beneficiaries (collectively "the claimants") appeared in the district court to contest the seizures and claim the funds.

The seizures were made pursuant to 21 U.S.C. § 881(a)(6), which provides for the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance [as well as] *all proceeds traceable to such an exchange*" (emphasis added), the government proceeding under the italicized phrase. Section 881(b), as it then read, provided that the government could institute civil forfeiture *in rem* proceedings by following the process set forth in the Admiralty Rules, particularly Rule C, which authorizes the arrest of a vessel or other property to enforce a maritime lien against it.[11]

That portion of the *Daccarett* opinion pertinent to the present appeal was prompted by certain contentions of the claimants:

> Claimants argue that EFTs are not seizable properties for purposes of the civil forfeiture statutes because they are merely electronic communications. They claim that an EFT is not

11. After *Daccarett* was decided, Congress deleted the reference to the Admiralty Rules from 21 U.S.C. § 881(b), which now provides that "[a]ny property subject to forfeiture to the United States under this section may be seized by the Attorney General in the manner set forth in section 981(b) of Title 18." 18 U.S.C. § 981(b)(2)(A) provides that a seizure may be made without a warrant if "a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant *in rem* pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims." This statutory restructuring does not alter the substantive reality that admiralty practice as expressed by the Admiralty Rules is incorporated into the drug civil forfeiture statute.

> a direct transfer of funds, but rather a series of contractual obligations to pay. Furthermore, they define an EFT as "an intangible property, which not only cannot be stopped once transmitted, but the Intermediary Bank upon accepting it cannot alter from the instructions contained therein." Finally, they claim that only after a transmission is complete and the communication is accepted and received by the beneficiary does it become a seizable *res*.

6 F.3d at 54. This is in effect the argument the intermediary banks made in *Reibor* in an effort to insulate EFTs from maritime attachment under Admiralty Rule B. While the *Reibor* court declined to decide whether EFTs were subject to attachment under Admiralty B, the *Daccarett* court squarely held that EFTs are subject to arrest under Admiralty Rule C:

> The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved

> from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

6 F.3d at 54. That is precisely what happened in the instant case. The processes of attachment Winter Storm seeks to enforce were served upon BNY after funds had moved from BA, the originating bank, to BNY as intermediary bank, but before BNY transferred the funds to RBS, the destination bank.

The *Daccarett* court's analysis of an EFT led to its conclusion that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statutes." 6 F.3d at 55. There is no principled basis for applying a different analysis or arriving at a different conclusion in the instant case. It is of no moment that *Daccarett* was a drug case and this is an admiralty case, or that the civil forfeiture statute and the Admiralty Rules differ in their descriptions of the circumstances justifying process against property, or that in *Daccarett* the government used Admiralty Rule C to arrest the funds while Winter Storm used Rule B to attach them. These are distinctions without a difference because they do not bear upon the decisive question presented, namely, whether EFT funds in the hands of an intermediary bank are subject to interdiction by legal

process. *Daccarett's* holding that such funds are subject to Admiralty Rule C arrest furnishes authority for the conclusion that they are equally subject to Admiralty Rule B attachment. We reach that conclusion in this case.

It follows that the broad, inclusive language of Admiralty Rule B(1)(a) and the EFT analysis in *Daccarett* combine to fashion a rule in this Circuit that EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a). Because that rule is derived from federal law, there is no occasion to look for guidance in state law. However, the district court looked to state law as embodied in U.C.C. § 4-A-503 and held it was fatal to Winter Storm's attachment. Even if, contrary to the conclusion we have just expressed, it was appropriate to consider state law, this provision of the U.C.C. cannot abrogate Winter Storm's right to a maritime attachment.

V. U.C.C. § 4-A-503

U.C.C. § 4-A-503 prohibits courts from restraining EFT funds in the hands of an intermediary bank. The Official Comment to the section clearly states its purpose: "In particular, intermediary banks are protected." The section's effect in this case, as evidenced by the district court's conclusion, is to deprive Winter Storm of the ability to serve process of maritime attachment upon TPI's funds in the hands of BNY. That is an impermissible effect because Admiralty Rule B preempts U.C.C. § 4-A-503.

In *American Dredging Co. v. Miller*, 510 U.S. 443, 446-447 (1994), the Supreme Court reiterated that while

it is "the consequence of exclusive federal jurisdiction that state courts may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction," in exercising *in personam* jurisdiction "a state may adopt such remedies, and . . . attach to them such incidents, as it sees fit so long as it does not attempt to make changes in the substantive maritime law"; that latter proviso "is violated when the state remedy works material prejudice to the characteristic features of the general maritime law *or* interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* (citations and internal quotation marks omitted) (emphasis added). These prohibited effects are stated in the disjunctive; either results in maritime law preemption of a state remedy.

That principle of preemption applies to state statutes enacted for the protection of banks, as this Circuit held in *Aurora*, 85 F.3d 44, a decision which is dispositive of this aspect of the instant case. In *Aurora* the plaintiff obtained an Admiralty Rule B maritime attachment of the defendant's account in a New York bank. The bank moved for an order vacating plaintiff's attachment so that the bank could exercise a right of set-off against the account created by New York Debtor and Creditor Law § 151 in favor of the bank. This Court held that the garnishee bank's set-off right conflicted with the plaintiff's Admiralty Rule B right of attachment, since if the set-off were enforced in the bank's favor there would be a smaller amount of funds subject to maritime attachment. The opinion in *Aurora* notes that "[m]aritime attachment is by any test a characteristic feature of the general maritime law," it being "self-evident that the maritime attachment is not merely well established in admiralty,

but that it is a unique, characteristic feature of that branch of our law." *Id.* at 47-48 (citations and internal quotation marks omitted). Accordingly, the *Aurora* court held that in view of *American Dredging's* limitations upon state laws, Admiralty Rule B preempted § 151 of the New York Debtor and Creditor Law: "By permitting a bank to set off amounts owed to it against a defendant's account notwithstanding an earlier maritime attachment, therefore, Section 151 threatens to undermine the power of federal admiralty courts sitting in New York to enforce substantive admiralty law." *Id.* at 48.[12]

U.C.C. § 4-A-503, another state statute enacted for the protection of banks, has the effect of eliminating Winter Storm's right of maritime attachment, rather than simply limiting it, as did the preempted state statute in *Aurora.* The rationale of *Aurora* squarely applies to this case, so that even if a general recourse to state law were appropriate, the particular statute upon which the district court grounded its decision is preempted by the general maritime law.

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12. *Aurora* also held that § 151 of the New York Debtor and Creditor Law impermissibly interfered with the uniformity of maritime attachment law in its interstate context, that being the second of the two prohibitions on state remedies articulated in *American Dredging.* In the present case, although TPI discusses uniformity at some length in its brief, the briefs for Winter Storm make it plain that it relies solely upon the prohibited effect of working prejudice to a characteristic feature of the general maritime law. One prohibited effect is sufficient for preemption, and the presence of that particular prohibited effect is manifest.

Appendix A

CONCLUSION

For the foregoing reasons, we vacate the judgment of the district court and remand the case to that court with instructions to reinstate the maritime attachment obtained by Winter Storm and to retain jurisdiction in the case in accordance with the principles and practices of federal admiralty law.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 11, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

01 Civ. 5650 (SAS)

WINTER STORM SHIPPING, LTD.,

Plaintiff,

-against-

TPI, a/k/a THAI PETROCHEMICAL, INDUSTRY PUBLIC COMPANY LIMITED, THAI PETROCHEMICAL INDUSTRY PCL, TPI OIL (1997) CO., LTD. AND TPI OIL CO. LTD.,

Defendant.

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

On June 21, 2001, Winter Storm Shipping, Ltd. ("Winter Storm") applied *ex parte* for an order of maritime attachment pursuant to the Federal Arbitration Act, 9 U.S.C. § 8 ("FAA"), and Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B" or "Rule B(1)"). The order of attachment was granted the same day. *See* 6/21/01 Ex Parte Order for Process of Maritime Attachment, No. 01 Civ. 5650 ("Order of Attachment" or "Order").

Appendix B

Defendants Thai Petrochemical Industry and the other defendants (collectively, "TPI") now move to vacate the attachment of funds held by The Bank of New York ("BONY") in a suspense account. For the reasons set forth below, TPI's motion to vacate the attachment and to dismiss the complaint is granted.

I. BACKGROUND

In February 2001, TPI, a Thai corporation, entered into a maritime contract to charter the M/V Nimenia ("the ship") from Winter Storm, a foreign corporation with a place of business in Malta. *See* Verified Complaint ("Compl.") ¶¶ 2-4. According to Winter Storm, TPI breached the contract on March 7, 2001, at a port in Saudi Arabia by loading "non-contractual cargo crude oil" onto the ship. *See id.* ¶ 5. Winter Storm further alleges that TPI failed to pay freight costs of $205,757.90 as required by the contract. *See id.* ¶ 7. It is this sum, to which interests, costs and fees have been added for a total of $361,621.58, that Winter Storm seeks to recover in an arbitration instituted in London. Both parties have now appointed arbitrators, and the arbitration is proceeding. *See* Plaintiff's Opposition to Defendants' Motion to Vacate the Attachment and Dismiss the Complaint ("Pl. Opp.") at 1.

On June 21, 2001, Winter Storm brought an action in this Court to secure its claims in the London proceeding under the FAA and Rule B(1). Satisfied that plaintiff made a *prima facie* showing under Rule B by filing a verified complaint and an affidavit stating that defendants could not be found in this district, *see infra* Part II, this Court issued an order of

attachment enabling Winter Storm to attach TPI's assets in this district. *See* Order of Attachment. The Order provided that

> process of maritime attachment and garnishment shall issue against all goods, chattels, letters of credit, bills of lading, effects, debts and monies, tangible or intangible, belonging to, claimed by or being held for the Defendant by any garnishees within this district, including Chase Manhattan Bank, in an amount up to and including $361,621.58.

Id. at 2. Pursuant to the order, Winter Storm served various garnishees, including BONY. *See* Defendants' Memorandum of Law to Support its Motion to Vacate and Dismiss ("Def. Mem.") at 1. Winter Storm served BONY with a writ of maritime attachment on June 28, 2001, at 10:30 a.m., 12:15 a.m., and 4:44 p.m.; three more times on June 29, 2001; and, following a weekend during which banks were closed, on July 2, 2001 at 10:58 a.m. *See* Pl. Opp. at 2.

Winter Storm succeeded in arresting a wire transfer ("electronic fund transfer" or "EFT") initiated by TPI. At some point prior to July 2 at 6:48 a.m. (Eastern Standard Time), TPI had instructed its bank in Thailand, the Bank of Ayudhya, to transfer funds from TPI's account to an account at the Royal Bank of Scotland in London. *See* Defendants' Reply in Support of its Motion to Vacate ("Def. Reply") at 3. At 6:48 a.m. on July 2, in its capacity as an intermediary between the Thai and British banks, BONY received a payment order from the Bank of Ayudhya via the SWIFT

electronic funds transfer system. *See* Pl. Opp. at 2. BONY debited the Bank of Ayudhya's account and, aware of earlier writs of attachment served by plaintiff, placed the sum of $361,621.58 in a suspense account. *See id.*

II. LEGAL STANDARD

Courts order maritime attachment pursuant to the FAA, 9 U.S.C. § 8, and Rule B(1).[1] Rule B is properly invoked when a plaintiff files (1) a verified complaint *in personam* sufficient to make a *prima facie* showing that the plaintiff has a maritime claim against the defendant in the amount sued for, and (2) an affidavit swearing that the defendant is not present in the district. Supp. R. B(1); *see also* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 21-2 at 471 (2d ed. 1999).

Because TPI has moved to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), this Court must accept as true all material factual allegations in the complaint. *See Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992). The party asserting jurisdiction, however, bears the burden of demonstrating that such jurisdiction exists. *See Shipping Fin. Serv. Corp. v.*

1. The Supplemental Rules apply to admiralty and maritime claims within the meaning of Federal Rule of Procedure 9(h) with respect to (1) maritime attachment and garnishment; (2) actions in rem; (3) possessory, petitory, and partition actions; and (4) actions for exoneration from or limitation of liability. *See* Supp. R. A; *Continental Shipping Corp. v. Telfair Int'l Corp.*, No. 88 Civ. 7257, 1990 WL 130765, at *1 (S.D.N.Y. Sept. 4, 1990).

Drakos, 140 F.3d 129, 131 (2d Cir. 1998). Winter Storm thus bears the burden of demonstrating why the attachment, which is the basis for this Court's jurisdiction over TPI, should not be vacated. *See* Fed. R. Civ. P. E(4)(f); *Maritima Petroleo E Engenharia, Ltda v. Ocean Rig I AS*, 78 F. Supp. 2d 162 (S.D.N.Y. 1999).

III. GENERAL PRINCIPLES OF MARITIME ATTACHMENT

Maritime attachment is an ancient remedy that has become a "characteristic feature" of the general maritime law. *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 47 (2d Cir. 1996) (citing *American Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994)). Maritime law itself is a separate body of substantive and procedural law, distinct from common law. *See* U.S. Const. art. III, § 2; *see also Schiffhartsgesellschaft Leonhardt v. Bottachi SA*, 773 F.2d 1528, 1533 (11th Cir. 1985). The present Rule B, promulgated under the Rules Enabling Act, 28 U.S.C. §§ 2071-77, is "simply an extension of [the] ancient practice" of maritime attachment. *Aurora*, 85 F.3d at 47-8.

Rule B and its predecessors provide for attachment when the defendant cannot be found within the district because:

> to compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel in rem) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons or his

> goods or credits attached, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice.

Id. at 48 (citing *In re Louisville Underwriters*, 134 U.S. 488, 493 (1890)). In the absence of this practice, "defendants, their ships, and their funds could easily evade the enforcement of substantive rights of admiralty law." *Aurora*, 85 F.3d at 47. *See also Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 637 (9th Cir. 1982) ("A ship can quietly slip its moorings and depart the jurisdiction. It can easily take with it such tangible property as may be within the jurisdiction. And credits can be quickly transferred elsewhere.").

Rule B serves two purposes: to provide a means to assure satisfaction if a suit is successful, and to insure a defendant's appearance in an action. *See Aurora*, 85 F.3d at 48 (citing *Swift & Co. v. Compania Colombiana del Caribe*, 339 U.S. 684, 693 (1950)). Because these purposes are "inextricably linked to a plaintiff's substantive right to recover" and maritime attachment is a characteristic feature of the general maritime law, no state legislation or other law may contravene Rule B or in any way interfere with it. *Aurora*, 85 F.3d at 48.

IV. DISCUSSION

The key question here is whether a wire transfer intercepted at an intermediary bank is property, because Rule B(1) only allows for "a prayer for process to attach the defendant's *tangible or intangible personal property*. . . ." Supp. R. B(1)

(emphasis added).[2] Rule B itself, however, does not define this phrase. Nor does the Committee Note to Rule B provide any guidance as to whether an electronic fund transfer, as it passes through an intermediary bank, is attachable property.

In answering this question, this Court must apply federal law because the validity of a maritime attachment is governed by federal law. *See Reibor Int'l Ltd. v. Cargo Carriers Ltd.*, 759 F.2d 262, 266 (2d Cir. 1985); *Maryland Tuna Corp. v. Nichimen Co.*, 429 F.2d 307, 320 (2d Cir. 1979) ("State law is irrelevant to the validity of process under Supplemental Rule B(1)."). Where there is little or no federal precedent on point, however, courts sitting in admiralty look to state law to "fashion[ ] suitable federal common law." *Reibor*, 759 F.2d at 266 (relying on *Det Bergenske Dampskipsselskab v. Sabre Shipping Corp.*, 341 F.2d 50 (2d Cir. 1965)).

A. No Federal Precedent

There is no federal precedent on point. Although Winter Storm claims that two federal cases stand for the proposition that a wire transfer at an intermediary bank constitutes property, the decisions are inapposite. The first, *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), held that a wire transfer

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2. Supplemental Rule B(1) was amended in 2000 to incorporate the following stylistic change: Instead of "good, chattel, credit or effect," the Rule now reads "tangible or intangible property." Supp. R. B(1). *See also* Committee Note, Supp. R. B(1) (explaining that the 2000 amendment includes stylistic changes). The Committee Note contains no further explanation for this particular change, and therefore the Court's holding is in no way based on a more restrictive interpretation of Rule B — as espoused by defendants.

is a seizable res as defined by a forfeiture statute. *Id.* at 54. The claimants of seized funds in that case argued that the money was wrongly seized because electronic fund transfers ("EFTs") are mere electronic communications. *See id.* The court applied the plain language of the civil forfeiture statute in issue, which provided for the seizure of "moneys, negotiable instruments, securities, or other things of value [, and] all *proceeds traceable*" to narcotics transactions. *Id.* (citing 21 U.S.C. § 881(a)(6)) (emphasis added).[3] *Daccarett* summarized its holding: "Therefore, an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res under the forfeiture statutes." *Id.* at 55.

Daccarett did not address the issue of whether an electronic fund transfer, when intercepted at an intermediary bank, constitutes "property." The fact that the government can seize proceeds at any bank as long as there exists some "traceable connection to an illegal transaction in controlled substances," *id.* at 54, sheds little light on whether an electronic funds transfer is property under maritime law.

The second case Winter Storm cites, *BCCI Holdings*, is unhelpful for a different reason. In that case, the United States had seized all of BCCI's assets in the United States following the bank's collapse due to mismanagement and fraud, and moved to dismiss all third-party claims to BCCI's assets. *See United States v. BCCI Holdings SA*, 980 F. Supp. 21, 23-4 (D.D.C.1997). One claimant, Khawaja Qadeer

3. The court also relied on *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158 (2d Cir.1986), which interpreted similar provisions of civil forfeiture law to hold that bank credit is "clearly traceable proceeds" and therefore seizable. *See id.*

Ahmed, argued that he retained title to seized wire transfer funds that he had mistakenly wired to BCCI. *See id.* at 25-26. To determine whether the assets in issue belonged to BCCI or to Ahmed, the court looked to Article 4A of the Uniform Commercial Code ("U.C.C.") for the definition of "acceptance" at a receiving (beneficiary) bank. *See id.* at 27. It concluded that Ahmed retained title to the funds under N.Y. U.C.C. §§ 4-A-209(3), 4-A-207(1), because Ahmed did not have an account at the beneficiary bank, BCCI, which as a consequence could not "accept" Ahmed's misrouted wire transfer. *See id.*

Winter Storm relies on *BCCI Holdings* to argue that TPI retained title to the funds until the beneficiary bank in Scotland "accepted" them, and therefore the funds were TPI's property at the time of attachment at BONY. *See* Pl. Opp. at 10-22. The problem with plaintiff's reliance on *BCCI Holdings* is simple: *BCCI* applies Article 4A of the N.Y. U.C.C. As explained in more detail below, Article 4A also provides that there is no attachable "property" while the wire transfer is in progress. *See* Official Comment, U.C.C. § 4-A-502. Article 4A states that parties seeking to attach wire transfer funds must do so at the bank of origin or at the destination bank — but not in between. *See* N.Y. U.C.C. § 4-A-503. The Comment explains that the rule prohibiting attachment of a wire transfer midstream was drafted to protect intermediary banks. Official Comment, U.C.C. § 4-A-503.

The leading Second Circuit case on maritime attachment makes clear that whether a funds transfer at an intermediary bank constitutes property remains unanswered by federal courts. *Reibor* involves a CHIPS transfer attached at an

intermediary bank in New York. *Reibor*, 759 F.2d at 263-64 (describing CHIPS as "a system for the electronic transfer of funds among member banks through a central computer"). The Second Circuit affirmed the district court's vacatur of the attachment, *see id.* at 266-67, without passing on the "property" issue that the district court had expressly reserved. *See Reibor Int'l, Ltd. v. Cargo Carriers, Ltd.*, No. 83 Civ. 793, 1984 WL 1467, at *2 (S.D.N.Y. July 24, 1984) ("Although there is some dispute as to whether a CHIPS credit passing through collecting banks is attachable property within the meaning of Rule B, we do not reach this question.").[4]

B. Federal Common Law

Because "the precedent in federal admiralty law is so thin" and there is "state law more directly on point," I turn now to state law. *Reibor*, 759 F.2d at 263. It is especially appropriate to look to New York law because "New York is the situs of multiple transactions in world commerce, [making] the New York banking system . . . particularly vulnerable to [disruption]." *Id.* at 266 (looking to New York

4. On the issue of whether there is federal law on this point, I also note that the Federal Reserve System has adopted Article 4A of the U.C.C. to govern FEDWIRE transactions, including sections 4-A-502 and 4-A-503 which prohibit attachment of wire transfers at intermediary banks. *See* 12 C.F.R. Pt. 210, Subpt. B, App. B (1990) ("Article 4A, Funds Transfers"). By its terms, however, Regulation J does not control the transaction at issue in this case, a SWIFTWIRE international transfer. *See id.* § 210.25 (providing "rules to govern fund transfers through Fedwire"); *id.* § 210.25(b)(2) (defining rights and obligations governed by Regulation J).

law). *See also Ferrostal Metals Corp. v. S.S. Lash Pacifico*, 652 F. Supp. 420 (S.D.N.Y.1987) (relying on law of New York to determine validity of maritime garnishment because "New York is the situs of multiple transactions in world commerce . . .").[5]

New York law is directly on point. New York has adopted Article 4A of the U.C.C. to govern wire transfers of funds. *See* N.Y. U.C.C. Art. 4A (McKinney 1991). With respect to attaching the funds of a person who initiates a wire transfer (an "originator"), the Article provides that a court may only "restrain" (1) a person from issuing a payment order to initiate a funds transfer; (2) an originator's bank from executing the payment order of the originator; or (3) the beneficiary's bank from releasing the funds to the beneficiary. N.Y. U.C.C. § 4-A-503; *see also* Official Comment, U.C.C. § 4-A-503 (indicating that such restraints may include orders of attachment, among other types of restraints issued on behalf of creditors or other claimants with respect to bank accounts). A creditor cannot reach any other funds because "no property of the originator is being transferred." Official Comment, U.C.C. § 4-A-502. The Comment is more explicit: "This section . . . is designed to prevent interruption of a funds transfer after it has been set in motion[;] . . . [i]n particular,

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5. The decision to look to New York law does not, of course, change the fact that federal law governs the validity of maritime attachment. *See Reibor*, 759 F.2d at 266, n.3 ("State law remains irrelevant to the validity of a maritime attachment because it is federal law that determines what attachments are valid."). I look to state law only "as a matter of federal law" to inform the content of federal common law. *Id.*

intermediary banks are protected." Official Comment, U.C.C. § 4-A-503. *See also Weston Compagnie v. La Republica de Ecuador*, No. 93 Civ. 2698, 1993 WL 267282, at *3-4 (S.D.N.Y. July 14, 1993) (applying N.Y. U.C.C. § 4-A-503 in a non-maritime case to vacate attachment of electronic funds transfer at intermediary bank).

Not only is this rule applied in New York, but Winter Storm concedes that Article 4A of the U.C.C. has been adopted by fifty-two jurisdictions. *See* Pl. Opp. at 12 (citing *The Law of Electronic Fund Transfers*, Vol. 1-1 § 1.05).

C. Analysis

Winter Storm can only attach "tangible or intangible personal property." Supp. R. B(1). From the express provisions of the New York U.C.C., it is apparent that a wire transfer at an intermediary bank is not property. *See* N.Y. U.C.C. §§ 4-A-502, 4-A-503. Because Winter Storm cannot show that the wire transfer that TPI originated at the Bank of Ayudhya was TPI's property when being processed at BONY, the attachment must be vacated. *See, e.g., Union Planters Nat'l Bank v. World Energy Sys. Assoc.*, 816 F.2d 1092 (6th Cir. 1987) (affirming a decision to quash a Rule B attachment because funds available under a letter of credit are not property subject to attachment); *Oceanfocus Shipping, Ltd. v. Naviera Humbolt*, 962 F. Supp. 1481 (S.D. Fla. 1996) (vacating attachment of secured line of credit because not "a good, chattel, credit or effect" subject to attachment under old Rule B); *Ferrostal*, 652 F. Supp. at 424 (vacating

maritime attachment of open letter of credit because not property).[6]

There are only two places at which a wire transfer credit is attachable property under Rule B: the bank of origin before a funds transfer is released, and the beneficiary's bank before the funds are released or paid to the beneficiary. *See Weston*, 1993 WL 267282, at *2-4 (applying N.Y. U.C.C. §§ 4-A-502, 4-A-503 in non-maritime case). Not only does this comport with the law of all the jurisdictions, but also makes sense in light of maritime law principles. *See supra* note 6.

When deciding a maritime case, a court must consider "the proper harmony and uniformity of maritime law." *American Dredging*, 510 U.S. at 451 (citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917)). *See also Aurora*, 85 F.3d at 48 (stressing the importance of "consistent nationwide application of Rule B"). As plaintiff concedes, fifty-two jurisdictions incorporate Article 4A of the U.C.C. and therefore prohibit attachment of wire transfer credits at intermediary banks. Further, the Federal Reserve System has enacted Article 4A of the U.C.C. to govern wire transfers

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6. Plaintiff argues that vacating this attachment would materially prejudice its rights under Rule B, *see* Pl. Opp. at 17-22, yet provides no support for the proposition that being able to attach wire transfer credits at an intermediary bank is a substantive right under Rule B. To the contrary, Rule B only permits attachment of tangible or intangible property. Vacating this attachment does not limit plaintiff's federal remedy of attachment in aid of foreign arbitration; it merely defines the limitations of Rule B's definition of the term "property."

from and to Federal Reserve Banks. *See supra* note 4. Thus, applying the same rule to govern wire transfers in federal maritime law furthers a uniform treatment of wire transfers. Indeed, "[f]reeing garnishees from the burden of keeping track of yet another difference between state attachment law and admiralty attachment law has value in and of itself." *Reibor*, 759 F.2d at 267.

Moreover, it is well established that "[m]erchants engaging in maritime commerce must reasonably expect to be sued where their property may be found." *Leonhardt*, 773 F.2d at 1536 (citing *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 655 (2d Cir. 1979)). TPI can only foresee suit based on the situs of its property if it knows where its property is — for example, where it maintains a bank account. An originator of a wire transfer does not know what intermediary bank or banks its wire transfer credit may pass through.[7] Permitting wire transfer credits to be attached at unforeseen and unknown intermediary banks runs contrary to the (minimal) due process accorded maritime defendants. *See, e.g., Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp. 706, 710 (S.D.N.Y. 1978) (stating that maritime defendant must be reasonably able to foresee being sued in the United States based on the location of its property).

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7. Although New York is an international hub for currency exchange, this Court declines to endorse a rule stating that every time a foreign maritime entity initiates a wire transfer abroad, it must foresee attachment in New York and suit in the United States.

Appendix B

V. Parties' Arguments

A. Standing

Winter Storm argues that if the attached funds do not constitute TPI's property, then TPI has no legally cognizable interest and can allege no injury. *See* Pl. Opp. at 4-6. This argument is unavailing. This Court's jurisdiction over defendants is based on the attachment. If the attachment is improper, there is no jurisdiction. A party may always raise an issue as to the court's jurisdiction.

B. Preemption

The thrust of plaintiff's opposition to defendants' motion to vacate the attachment is that Rule B preempts New York or other state law. *See id.* at 10-22. While federal maritime law certainly preempts any state law that conflicts with it, *see, e.g., Aurora*, 85 F.3d at 48, the argument fails here for two reasons. *First*, there is no federal law that conflicts with state law. *Second*, Winter Storm fails to show that the attachment of wire transfer funds at intermediary banks is a substantive admiralty or maritime right.[8]

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8. Plaintiff cites to an oral ruling by a judge in this district. *See Vrinera Marine Co., Ltd. v. Alexandria National Iron & Steel Co.*, No. 01 Civ. 4536 (Transcript of July 12, 2001), attached as Exhibit 4 to Declaration of Patrick F. Lennon, Plaintiff's Counsel (ruling that attachment of electronic transfer at intermediary bank should not be vacated because Rule B preempts N.Y. U.C.C. §§ 4A-502 and 4A-503). While directly on point, this Court conducted only a cursory analysis of the issue, relying solely on *Daccarett* and *BCCI Holdings*. *See supra* Part IV.A.

Plaintiff cites only to "Rule B," arguing that Rule B does not limit the time when, or class of garnishees on which, a plaintiff may serve a writ of attachment. *See* Pl. Opp. at 13. Certainly, Rule B is simple and direct: it provides that where a defendant cannot be found within the district, a maritime plaintiff may obtain an order of attachment to garnish his property. It has since been interpreted by the courts, however. For example, while Rule B does not prescribe the time within which plaintiff must serve a writ of attachment, courts have established that plaintiff can only validly attach property by serving process at a time after — and not before — the property has come within the possession of the garnishee. *See Reibor*, 759 F.2d at 266-67. Further, this Court does not apply state law but merely borrows from it, as a matter of federal law, to inform the content of federal law. *See id.* at 266 n.3. Thus, Winter Storm's insistence — that an as-of-yet-uninterpreted Rule B requirement preempts state law — misses the point.

C. Service of Process

Defendants argue that Winter Storm's service of maritime process was invalid because BONY acted on its knowledge of writs that arrived prior to the electronic payment order. *See* Def. Reply at 9-10. Even if true, *i.e.*, a garnishee bank acts on information contained in ineffective writs of attachment by freezing funds when it receives a wire transfer, that does not contravene *Contichem* or *Reibor*. *See Contichem*, 229 F.3d 426 (vacating attachment on ground that plaintiff sought to end-run Rule B by seeking a temporary restraining order pending attachment proceedings); *Reibor*, 759 F.2d 262 (vacating attachment on specific ground

that process was served both before garnishee came into possession of funds and after garnishee released the funds, and no writ was served *while* garnishee was in possession of the funds). The goal of *Reibor* was to relieve the burden on garnishee banks to monitor future transactions. *See Reibor*, 759 F.2d at 267, 268. In any event, this issue need not be decided as the attachment is vacated on other grounds.

VI. CONCLUSION

Because I conclude that a wire transfer at an intermediary bank is not property subject to attachment under Rule B, defendants' motion to vacate the attachment is granted. Accordingly, this Court lacks jurisdiction over TPI and must dismiss Winter Storm's complaint. The Clerk is directed to close this case.

SO ORDERED:

s/ Shira A. Scheindlin
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
January 11, 2002

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED JANUARY 16, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

01 **CIVIL** 5650 (SAS)

WINTER STORM SHIPPING, LTD.,

Plaintiff,

-against-

TPI, a/k/a THAI PETROCHEMICAL, et al.,

Defendants.

JUDGMENT

Whereas, defendants having moved this Court to vacate the attachment of funds held by the Bank of NY in a suspense account, and the matter having come before the Honorable Shira A. Scheindlin, United States District Judge, who on January 11, 2002 having issued its Opinion (86455) and Order granting TPI's motion to vacate the attachment and to dismiss the complaint, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (86455) and Order dated January 11, 2002 defendants' motion to vacate the

attachment is granted; accordingly, the Court lacks jurisdiction over TPI and must dismiss Winter Storm's complaint; accordingly, this case is closed.

Dated: New York, New York
January 16, 2002

JAMES M. PARKISON
Clerk of Court

BY: s/ [illegible]
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 13, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th Day of January, two thousand three.

Docket No. 02-7078

WINTER STORM SHIPPING, LTD.,

Plaintiff-Appellant,

v.

TPI, a/k/a Thai Petrochemical, Industry Public Company Limited, Thai Petrochemical Industry PCL, TPI Oil (1997) Co., Ltd. and TPI Oil Co. Ltd.,

Defendant-Appellee.

Appendix D

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee, TPI.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: s/ Arthur M. Heller
Arthur M. Heller,
Administrative Attorney

APPENDIX E — RULES AND STATUTES INVOLVED

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE
FOR THE UNITED STATES DISTRICT COURTS
SUPPLEMENTAL RULES FOR CERTAIN
ADMIRALTY AND MARITIME CLAIMS

Amendments received to 1-20-03

Rule B. In Personam Actions: Attachment and Garnishment

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

> **(a)** If a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.
>
> **(b)** The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this **Rule B** appear to exist, enter an order so stating and

authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d)(i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an

action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

(2) Notice to Defendant. No default judgment may be entered except upon proof—which may be by affidavit—that:

(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4;

(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

Appendix E

(3) Answer.

(a) By Garnishee. The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) By Defendant. The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

Appendix E

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
UNIFORM COMMERCIAL CODE
CHAPTER 38 OF THE CONSOLIDATED LAWS
ARTICLE 4-A—FUNDS TRANSFERS
PART 5—MISCELLANEOUS PROVISIONS

Current through L.2003, chs. 4 to 19 and 52.

§ 4-A-502. Creditor Process Served on Receiving Bank; Set Off by Beneficiary's Bank

(1) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(2) This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order.

(3) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(a) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(b) The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(c) If creditor process with respect to the beneficiary's account has been served and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process.

Appendix E

(4) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

Appendix E

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
UNIFORM COMMERCIAL CODE
CHAPTER 38 OF THE CONSOLIDATED LAWS
ARTICLE 4-A—FUNDS TRANSFERS
PART 5—MISCELLANEOUS PROVISIONS

Current through L.2003, chs. 4 to 19 and 52.

§ 4-A-503. Injunction or Restraining Order With Respect to Funds Transfer

For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

Supreme Court, U.S.
FILED
MAY 16 2003
OFFICE OF THE CLERK

No. 02-1506

IN THE

Supreme Court of the United States

TPI, a/k/a THAI PETROCHEMICAL INDUSTRY PUBLIC COMPANY LIMITED, THAI PETROCHEMICAL LIMITED, THAI PETROCHEMICAL INDUSTRY PCL, TPI OIL (1997) CO., LTD. AND TPI OIL CO., LTD.,

Petitioners,

v.

WINTER STORM SHIPPING, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Winter Storm Shipping, Ltd. is a privately held corporation and has no parent company.

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TABLE OF CITED AUTHORITIES

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Cases:

Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985) 14

Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co., 85 F.3d 44 (2d Cir. 1996) 6, 10

Brenntag Int'l Chem., Inc. v. Bank of India, 175 F.3d 245 (2d Cir. 1999) 9

Diakan Love, S.A. v. Al-Haddad Bros. Enterprises, 584 F. Supp. 782 (S.D.N.Y. 1984) 9

Ferrostaal Metals Corp. v. S.S. Lash Pacifico, 652 F. Supp. 420 (S.D.N.Y. 1987) 9

Grand Bahama Pet. Co., Ltd. v. Canadian Transp. Agencies, Ltd., 450 F. Supp. 447 (N.D. Wash. 1978) 6

International Housing Ltd. v. Rafidain Bank Iraq, 893 F.2d 8 (2d Cir. 1989) 14

International Marine Consultants, Inc. v. Karavias, 1985 U.S. Dist. LEXIS 19272 (S.D.N.Y. 1987) ... 9

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 4

Cited Authorities

Page

Maryland Tuna Corp. v. The M/S Benares,
429 F.2d 307 (2d Cir. 1970) 5, 7

Organizacion JD Ltda. v. U.S. Dept. of Justice,
1996 U.S. Dist. LEXIS 4347 (E.D.N.Y. 1996) .. 12

Reibor Int'l Ltd. v. Cargo Carriers (KACZ-CO.) Ltd.,
759 F.2d 262 (2d Cir. 1985) 5, 7, 9, 14

Schiffahrtsgesellschaft Leonhardt & Co.
v. A. Bottacchi S.A. de Navegacion,
732 F.2d 1543 (11th Cir. 1984) 11

Union Planters Nat'l Bank
v. World Energy Systems, Assoc.,
816 F.2d 1092 (6th Cir. 1987) 9

United States v. Daccarett,
6 F.3d 37 (2d Cir. 1993) 8

Statutes, Rules & Regulations:

Federal Reserve System Regulation J,
Official Comment,
55 Fed. Reg. 40791 (Oct. 5, 1990) 12

Federal Reserve System Regulation J,
12 C.F.R. Part 210, *et seq.* 10, 12, 13

Cited Authorities

Page

Federal Rules of Civil Procedure,
Supplemental Admiralty Rule B,
Fed. R. Civ. P. Adm., Supp. B ..... *passim*

Federal Rule of Civil Procedure 64,
Fed. R. Civ. P. 64 11

Foreign Asset Control Regulations,
31 C.F.R. Part 500, *et seq.* 15

New York Uniform Commercial Code
Article 4A § 503,
N.Y. C.L.S. U.C.C. § 4-A-503
(McKinney 2001) ..... *passim*

Treatises & Law Review Articles:

Kluber, *Global Distributions:*
The Effect of Export Controls,
23 HOUS. J. INT'L L. 429 (2001) 15

The Law of Electronic Fund Transfers,
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COUNTER-STATEMENT OF THE CASE

This case involves a dispute between Respondent and Petitioner under a maritime charter party contract. On or about February 26, 2001, Respondent chartered the M/V NINEMIA to Petitioner. During the charter party, Petitioner wrongfully withheld freight due and owing to Respondent. Under the terms of the charter, the dispute between the parties is subject to arbitration in London, England. Both parties have appointed arbitrators and the arbitration is proceeding.

Respondent filed a Verified Complaint in the district court on June 21, 2001. On June 22, 2001, the district court issued an Order for ex parte attachment of Petitioner's property within the district. On June 27, 2001, Respondent filed an Amended Verified Complaint. The same day, pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, Fed. R. Civ. P. Adm., Supp. B (hereinafter "Supplemental Admiralty Rule B" or "Rule B"), the Clerk issued a supplemental writ of maritime attachment and garnishment authorizing attachment of Petitioner's property within the district, including any property held by Bank of New York (hereinafter "BNY") as garnishee, up to the amount of $361,621.58.

Respondent served the writ on several New York banks, including the BNY from June 27 through June 29, 2001. On July 2, 2001 at 6:48 a.m., BNY received by way of the Swift electronic funds transfer system a payment order for an international electronic funds transfer (hereinafter "EFT") from Petitioner's bank, Bank of Ayudhya, in Thailand. Petitioner was the originator of the funds transfer. The payment order instructed BNY to debit the sum

of $1,085,071.41 from Bank of Ayudhya's correspondent account at BNY and to remit that sum to the receiver's bank, Royal Bank of Scotland in London, for ultimate payment to Oppsal Shipping Co. Ltd. In response to Respondent's prior service of the writ of attachment, BNY debited Bank of Ayudhya's correspondent account and placed $361,621.58 of the funds into a suspense account in order to comply with the district court's June 22, 2001 Order. Later, at 10:58 a.m. on July 2, 2001, Respondent again served the writ of attachment on BNY. At that moment, Respondent perfected maritime attachment of the Petitioner's property as security for its claim pending in the London arbitration, and the district court thereby obtained jurisdiction over Petitioner.

Petitioner moved in the district court for an order vacating the attachment and dismissing the Amended Verified Complaint, arguing, *inter alia*, that the funds held by BNY were not its "property," as that term is interpreted under federal law set forth in Supplemental Admiralty Rule B. In its January 11, 2002 Opinion and Order, the district court agreed with that argument. The district court also held that, even if Respondent had attached Petitioner's "property" under Rule B, New York Uniform Commercial Code Article 4A § 503, N.Y. C.L.S. U.C.C. § 4-A-503 (McKinney 2001) (hereinafter "NY UCC 4A-503") expressly prohibited an attachment at the intermediary bank stage of an EFT. The district court reasoned that because there was no governing federal rule, application of NY UCC 4A-503 was appropriate. Subsequently, on January 28, 2002, the district court granted Winter Storm's motion for stay of execution of the January 17, 2002 judgment pending appeal.

On appeal, the United States Court of Appeals for the Second Circuit vacated the district court's judgment on the basis that prior Second Circuit precedent and the broad language of Rule B combine to fashion a rule in the Second Circuit that EFT funds may be attached pursuant to Rule B in the hands of an intermediary bank. The Second Circuit reasoned that because the rule is federal, there is no occasion to look to state law as the district court had done. Alternatively, the Second Circuit concluded that even if resort to state law is appropriate, Rule B preempts NY UCC 4A-503, the precise New York statute the district court relied on in vacating the attachment.

REASONS FOR DENYING THE WRIT

The paramount question which this case presents is whether an EFT constitutes tangible or intangible "property" for purposes of Supplemental Admiralty Rule B. Petitioner urges that the Second Circuit's decision, answering that question in the affirmative, conflicts with holdings of this Court and other circuits purportedly mandating that state law govern the question of what constitutes property when federal law does not define the term in context. The alleged conflict, however, is a product of Petitioner's misreading of the Second Circuit's decision. The Second Circuit took full account of governing cases and the analysis previously employed by courts that have addressed the issue.

No prior holding of this Court or any other federal court creates an absolute requirement that federal courts must look to state law for the definition of property for purposes of Rule B. Such a requirement, moreover, would eviscerate the admiralty preemption doctrine. Instead, precedent suggests that it is only in the absence of an established federal rule

that federal courts should look to state law in order to fashion a federal rule. The Second Circuit held that federal precedent from the Second Circuit itself provided the basis for a federal rule that an EFT, while in the hands of an intermediary bank, constitutes attachable property for purposes of Supplemental Admiralty Rule B. Because there was an established federal rule, there was no need to look to state law. The court reasoned, alternatively, that the key provisions of the state law the district court relied upon in vacating the attachment, *i.e.*, NY UCC Article 4A, would be preempted by Rule B in any event.

Finally, the Second Circuit's decision dealt with an issue unique to the New York banking system as the international clearing center for United States dollar transactions. As a result, the decision does not affect, and most certainly does not conflict with, the law in any other circuit.

I.

THE DECISION DOES NOT INVOLVE IMPORTANT FEDERAL-STATE "INTERPLAY" CONCERNS

Citing to *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), Petitioner contends that this case presents "novel questions as to the interplay of state and maritime law." Pet. at 6. This attempt to qualify the case as deserving of a writ of certiorari is flawed because it ignores entirely the fact that maritime attachments are governed by federal law and the Second Circuit's decision is entirely based on a federal rule.

Petitioner explains that the case below dealt with the "interplay" between Supplemental Admiralty Rule B and Article 4A of the Uniform Commercial Code under state law. The real question presented below, however, was whether, as a matter of federal law, a maritime attachment of an EFT in the hands of an intermediary bank constitutes tangible or intangible property for purposes of Supplemental Admiralty Rule B.

The Second Circuit has explained why state law has no application in this context:

> [s]tate law is irrelevant to the validity of process under Supplemental Rule B(1). . . . The purpose of the Supplemental Rule was to preserve the ancient process of maritime attachment that had been known to courts of admiralty for centuries. . . . The remedy, under the terms of Rule B(1), is completely independent of state law and of any state attachment or garnishment procedures, which may be employed by a libellant either instead of, or in addition to the process issued under the Rule.

Maryland Tuna Corp. v. The M/S Benares, 429 F.2d 307, 321 (2d Cir. 1970). *See also Reibor Int'l, Ltd. v. Cargo Carriers (KACZ-CO.) Ltd.*, 759 F.2d 262 (2d Cir. 1985) (federal law governs questions as to the validity of Rule B attachments).

Petitioner fails to challenge that part of the Second Circuit's decision holding that Rule B preempts NY UCC 4A-503, the specific New York state statute Petitioner relied on in its motion to vacate the attachment at the district court.

Accordingly, Petitioner has waived any argument concerning the Second Circuit's preemption analysis. Petitioner's argument regarding application of state law in a maritime attachment case crumbles because it fails to point to any error in the Second Circuit's preemption analysis. Application of any state law in a case governed by federal law must overcome preemption concerns. Petitioner has ignored the issue entirely.

Petitioner criticizes the Second Circuit for failing to apply state law, without any regard for the clearly identifiable preemption issue. The rule Petitioner advances would, if accepted, allow NY UCC § 4-A-503 to undermine the fundamental purposes of the ancient remedy of Rule B admiralty attachments. Courts have concluded that the remedy of maritime attachment is, by any measure, a characteristic feature of the general maritime law, *see Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 47 (2d Cir. 1996), and, as an action against property, a "keystone of admiralty jurisprudence." *Grand Bahama Pet. Co., Ltd. v. Canadian Transp. Agencies, Ltd*, 450 F. Supp. 447, 452-53 (N.D. Wash. 1978). Having waived any objection to the Second Circuit's preemption analysis, Petitioner must concede that NY UCC § 4-A-503 is preempted by virtue of its impermissible material prejudice to Rule B. In any event, the Second Circuit's preemption analysis is unassailable and controlling as to the federal-state interplay issue Petitioner raises.

II.

THE DECISION DOES NOT CONFLICT WITH ANY PRECEDENT

Petitioner's contention that the Second Circuit's holding on the "property" issue conflicts with precedent is founded upon a misconception of the issue. Petitioner theorizes that prior decisions of this Court and other circuit courts create an absolute requirement that state law define property interests when federal statutes touching on the issue fail to do so.

To the contrary, there is no absolute requirement. Rather, starting with the accepted premise that "[f]ederal law generally governs questions as to the validity of Rule B attachments," the Second Circuit followed its own precedent in analyzing the "property" issue. *Winter Storm*, 310 F.3d at 275 (Pet. Appx. A at 24a) (*quoting Reibor*, 759 F.2d at 266 (recognizing that although courts sitting in admiralty are obligated to apply federal law, they may look to state law where federal precedent is lacking or sparse)). *See also Maryland Tuna Corp. v. MS Benares*, 429 F.2d 307, 321 (2d Cir. 1970) (maritime attachment "under the terms of Rule B(1), is completely independent of state law" and "state law is irrelevant to the validity of process under Supplemental Rule B(1)").

In conducting its analysis of the property issue, the Second Circuit properly sought to determine as a first step "whether governing federal law provides the answer in general terms or otherwise; or whether federal law is silent on the particular question presented. . . ." *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263, 275-76 (Pet. Appx. A at

25a). The court's analysis, therefore, was proper and in keeping with the principle that federal law generally governs the validity of Rule B attachments. Nevertheless, Petitioner argues that the Second Circuit erred by not looking to state law, irrespective of governing federal law addressing the issue, such as Rule B itself.

Petitioner also contends that the Second Circuit's consideration of *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) was inappropriate because that case did not arise under admiralty jurisdiction. That contention is erroneous. *Daccarett* is a civil forfeiture case decided under federal drug laws. The court held in *Daccarett* that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res." *Daccarett*, 6 F.3d at 55. The EFT seizure was pursuant to the Supplemental Admiralty Rules. The case is clearly relevant here. In Petitioner's view, despite *Daccarett's* obvious relevance the Second Circuit should have ignored it on the basis that application of state law is mandatory, simply because the case was not decided under the court's admiralty jurisdiction. Petitioner has confused the source of the court's authority with the issue of whether there is a genuine federal rule; the two subjects have nothing to do with each other.

Second, cases analyzing the validity of Rule B maritime attachments pursuant to federal law, including those on which Petitioner relies, do not create a requirement that the controlling federal rule may arise only from cases decided under admiralty jurisdiction or that a federal court sitting in admiralty is bound to look to state law to determine what constitutes attachable property.

Instead, the relevant precedents hold that only in the absence of an established federal rule should federal courts look to state law in order to fashion a federal rule. In analyzing this issue, the Second Circuit held that prior federal precedent from the Second Circuit itself provided the basis for a federal rule that an EFT while in the hands of an intermediary bank constitutes attachable property for Supplemental Admiralty Rule B purposes. Thus, because federal law was not lacking or silent on the issue, the Second Circuit's decision to follow federal law on point was proper.

The cases Petitioner cites are not to the contrary. *See, e.g., Union Planters National Bank v. World Energy Systems, Assoc.*, 816 F.2d 1092 (6th Cir. 1987) (simply reciting the holding of *Reibor*, 759 F.2d 262); *Ferrostaal Metals Corp. v. S.S. Lash Pacifico*, 652 F. Supp. 420 (S.D.N.Y. 1987) (also citing *Reibor, supra*, and referring to state law only in the complete absence of a federal rule); *International Marine Consultants, Inc. v. Karavias*, 1985 U.S. Dist. LEXIS 19272 (S.D.N.Y. 1985) (holding only that to sustain maritime attachment, property must belong to defendant and plaintiff has burden of proving ownership; attachment was not vacated under New York corporate law); *Diakan Love, S.A. v. Al-Haddad Bros. Enterprises, Inc.*, 584 F. Supp. 782 (S.D.N.Y. 1984) (complete absence of any federal rule); *Brenntag Int'l Chem., Inc. v. Bank of India*, 175 F.3d 245 (2d Cir. 1999) (neither Rule B nor admiralty jurisdiction involved and no argument made that established federal rule existed on the issue in dispute).

The Second Circuit's decision was founded upon proper analysis of the key issue and the holding does not conflict with any decision of this Court or any other court. Rather, the holding is in harmony with other Second Circuit cases and is founded upon a logical interpretation and application of the Supplemental Admiralty Rules.

III.

THE DECISION DOES NOT AFFECT UNIFORMITY OF MARITIME LAW OR CREATE A HARDSHIP TO THE BANKING SYSTEM

A. The Decision does not affect uniformity of maritime law

Perpetuating the district court's flawed analysis, Petitioner contends that Second Circuit's decision disrupts uniformity of maritime law. Without identifying the issue specifically, Petitioner turns federal preemption analysis on its head by urging a misapplication of maritime law's uniformity principle, which derives from admiralty preemption cases.

The uniformity issue typically arises, as it did in *Aurora Maritime v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44 (2d Cir. 1996), when application of various state laws would lead to divergent results in cases decided under federal admiralty jurisdiction. What Petitioner actually is urging is uniformity of Uniform Commercial Code Article 4A as part of state law. Yet, application of state law in an admiralty case, even if it were to have the effect of promoting uniformity of the maritime law, must not work a material prejudice to a characteristic feature of the maritime law. As the Second Circuit reasoned, application of NY UCC 4-A-503 demonstrably prejudices Rule B, mandating preemption. *Winter Storm*, 310 F.3d at 279 (Pet. Appx. A at 33a-34a).

Petitioner's exhortations regarding the nationwide enactment of UCC Article 4A at the state level and its adoption under Federal Reserve System Regulation J[1] for

1. Federal Reserve System Regulation J, 12 C.F.R. Part 210 *et seq.*

the Fedwire transfer system are equally wide of the mark. The nationwide enactment of Article 4A and the likelihood that it would preclude attachment of an EFT pursuant to state law ignores the special role maritime law and Rule B play under federal law. That an attempted attachment in a federal proceeding pursuant to state attachment law under Federal Rule of Civil Procedure 64 might also be precluded by Article 4A is irrelevant for the same reason.

> Since 1844 Admiralty Rules of Procedure have had but one author: the United States Supreme Court. Their lineage sets them apart from common law based sequestration, garnishment, and attachment laws developed by the legislature of the several states. As offspring of the very institution charged with mandating the procedural safeguards required before property may be taken, Supplemental Rules for Admiralty must be reviewed with special deference.

Schiffahrtsgesellschaft Leonhardt v. A. Bottacchi S.A. De Navegacion, 732 F.2d 1543, 1548, 1549 (11th Cir. 1984) (citations omitted). The special deference afforded to the Supplemental Admiralty Rules renders invalid Petitioner's arguments regarding the potential disparate treatment of state attachment law. In sum, Petitioner fails to recognize that historically there has always been a "wedge" between state and maritime attachments. The banking system has, therefore, always had the task of distinguishing between attachment process issued pursuant to Supplemental Admiralty Rule B versus state attachment law. Contrary to Petitioner's suggestion, the Second Circuit's decision creates no new or different obligation on the banking system.

In furtherance of its effort to create the appearance of a conflict created by the Second Circuit's decision, Petitioner contends that the decision means that different rules will apply to Rule B attachments of EFTs at the intermediary bank stage depending on the funds transfer system at issue. Petitioner's argument is premised on Federal Reserve System Regulation J, 12 C.F.R. Part 210 *et seq.*, Regulation J makes UCC Article 4A applicable to EFTs under the Fedwire transfer system. More importantly, "Fedwire does not transfer funds outside of the United States." *Organizacion JD Ltda. v. U.S. Dept. of* Justice, 1996 U.S. Dist. LEXIS 4347, *5 (E.D.N.Y. 1996). Because Fedwire is purely a federally owned[2] domestic transfer system and is not involved in international EFTs, such as the EFT in this case which was pursuant to Swift, a private transfer system, Petitioner's fears over the impact of the Second Circuit's decision on Fedwire transfers are misplaced.

As Petitioner explains in its Petition, Swift is but one of three major transfer systems, the other two being Chips and Fedwire. In adopting Article 4A, however, the Federal Reserve Board declared that the adoption was necessary only "to ensure that the law applicable to *funds transfers involving Federal Reserve Banks is uniform for all Fedwire funds transfers*. . . ." Federal Reserve System Regulation J, Official Comment, 55 Fed. Reg. 40791 (1990) (emphasis added). While it is a fact that 52 jurisdictions have adopted Article 4A as state law, it is also a fact that "Article 4A was approved in 1989 by ALI and the National Conference of Commissioners on Uniform State Laws for adoption by the various states *against a view preferring the federal adoption*

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2. The Fedwire funds transfer system is "owned and operated by the Federal Reserve Bank. . . ." 12 C.F.R. § 210.26(e).

of a funds transfer statute." THE LAW OF ELECTRONIC FUND TRANSFERS, Vol. 1-1 § 1.05 (emphasis added). Moreover, Petitioner's uniformity argument premised on Regulation J is diluted by the fact that Regulation J itself makes clear that even UCC Article 4A as adopted under the Regulation may be preempted.[3] Logically, Regulation J might also preempt Article 4A enacted under state law to the extent the two conflict.

Petitioner places undue emphasis on Regulation J and its adoption of Article 4A to govern Fedwire transfers. As the district court correctly stated, "[b]y its terms . . . Regulation J does not control the transaction at issue in this case, a SWIFTWIRE international transfer. . . ." *Winter Storm Shipping Ltd. v. TPI*, 198 F. Supp. 2d 385, 389 n.4 (S.D.N.Y. 2002) (Pet. Appx. B at 45a). Application of UCC Article 4A at the federal level is clearly limited to Fedwire transfers alone. In any event, the conflict Petitioner perceives between Rule B and Regulation J is not an issue in this appeal and is no remedy for its ill-conceived uniformity argument.

B. The Decision does not create a hardship on the banking system

Petitioner also advances policy arguments which it claims merit the issuance of a writ of certiorari. Petitioner overestimates the impact of the Second Circuit's decision by asserting that it will open the floodgates to additional maritime attachment actions under Rule B, which in turn will

3. Regulation J states: "This subpart incorporates the provisions of Article 4A set forth in appendix B to this subpart. In the event of an inconsistency between the provisions of the sections of this subpart and appendix B, to this subpart, the provisions of the sections of this subpart shall prevail." 12 C.F.R. § 210.25(b)(1).

supposedly overburden the banking system. Petitioner is wrong on both points and ignores the reality that the issue the Second Circuit addressed is unique to the New York banking community.

Prior to the enactment of Article 4A of the Uniform Commercial Code in 1990, when there was not state legislation in the area, there was no flood of EFT attachments pursuant to Rule B. It is therefore inconceivable that the Second Circuit's decision will lead to a burgeoning of maritime attachments. This is especially true when any maritime attachment of an EFT must still meet the timing requirement established in *Reibor*, 759 F.2d 262 (2d Cir. 1985) (attachment is void unless garnishee possesses defendant's property at the time process is served on garnishee).

Regarding the hardship to the banking system that Petitioner alleges the decision will produce, the Second Circuit has recognized in other cases that foreign parties often make payment in U.S. dollars by clearing EFTs through New York, because New York is "the international clearing center for United States dollars." *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 13 (2d Cir. 1989) (Kaufman, J. dissenting) (quoting *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 (2d Cir. 1985), *cert. dismissed*, 473 U.S. 934, 87 L. Ed. 2d 706, 106 S. Ct. 30 (1985)). Thus, the Second Circuit's decision addresses an issue that is in practical terms limited to the Second Circuit and, more precisely, the New York banking system.

Moreover, Petitioner ignores entirely the fact that the entire United States banking system already copes on a daily basis with far greater burdens imposed by drug forfeiture

statutes and foreign asset control regulations administered by the Office of Foreign Asset Control of the United States Department of the Treasury. *See* 31 C.F.R. Part 500 *et seq.* To ensure compliance with these regulations, banks routinely utilize "interdiction software" to screen EFT transactions. *See* Kluber, *Global Distributions: The Effect of Export Controls*, 23 HOUS. J. INT'L L. 429, 452 nn. 147-48 (2001).

The Second Circuit's decision imposes on the banking system no greater or different burdens beyond those with which it already copes quite well. Logically, any disruption of electronic funds transfer systems created by maritime attachment of EFTs would be identical in all respects to those created by seizures of EFTs under federal criminal and civil laws, or those created by EFT interdictions pursuant to OFAC regulations. Yet, neither the Federal Reserve Bank of New York, nor the New York Clearing House Association, LLC, both of which made *amicus curiae* submissions to the Second Circuit, have complained about the latter burdens.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

TPI, a/k/a THAI PETROCHEMICAL INDUSTRY PUBLIC COMPANY LIMITED, THAI PETROCHEMICAL LIMITED, THAI PETROCHEMICAL INDUSTRY PCL, TPI OIL (1997) CO., LTD. and TPI OIL CO. LTD.,

Petitioners,

v.

WINTER STORM SHIPPING, LTD.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR *AMICUS CURIAE* THE NEW YORK CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED IN THE PETITION

"The question presented is whether a federal district court sitting in admiralty should properly look to state law to determine whether a defendant has property in the district subject to attachment under Supplemental Admiralty Rule B, which does not define what is meant by 'property', or does Rule B preempt state law such as the prohibitions of Article 4A of the Uniform Commercial Code against restraining an electronic funds transfer at the intermediary bank stage, where Article 4A provides that a defendant has no property at the intermediary bank stage subject to attachment."

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IN THE

Supreme Court of the United States

No. 02-1506

TPI, a/k/a THAI PETROCHEMICAL INDUSTRY PUBLIC COMPANY LIMITED, THAI PETROCHEMICAL LIMITED, THAI PETROCHEMICAL INDUSTRY PCL, TPI OIL (1997) CO., LTD. and TPI OIL CO. LTD.,

Petitioners,

v.

WINTER STORM SHIPPING, LTD.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS CURIAE* [1] THE NEW YORK CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

With the consent of the parties, The New York Clearing House Association L.L.C. (the "Clearing House") submits this brief as *amicus curiae* in support of the Petition of Thai

[1] No counsel for a party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of the brief.

Petrochemical Industry Public Company Limited ("TPI") for a Writ of Certiorari ("Petition") for review of the opinion of the United States Court of Appeals for the Second Circuit filed November 6, 2002 (the "Opinion") in this matter.

The Clearing House respectfully submits that the Second Circuit's decision should be reviewed by this Court because it creates a federal property right out of whole cloth, is inconsistent with federal and state statutory law regarding electronic funds transfers ("EFTs") and the sound policies on which that law is based, conflicts with applicable precedent of this Court and another circuit court, and would create significant and unwarranted disruption to international commercial banking practice.

STATEMENT OF INTEREST OF *AMICUS*

The Clearing House is an association of leading commercial banks that provides payment, clearing and settlement services to its member banks and other financial institutions.[2] The Clearing House regularly appears as *amicus curiae* before appellate courts in cases that raise significant legal issues relating to banking and in particular in cases, like this one, that raise important questions concerning rules governing national and international payment systems.

The Clearing House banks have a substantial interest in the question presented in this case. Electronic funds transfers involving international banks are often routed through Clearing House banks because of their leading presence both in the United States and globally, their widespread bank

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[2] The members of the Clearing House are Bank of America, National Association, The Bank of New York, Bank One, National Association, Citibank, N.A., Deutsche Bank Trust Company Americas, Fleet National Bank, HSBC Bank USA, JPMorgan Chase Bank, LaSalle Bank National Association, Wachovia Bank, National Association and Wells Fargo Bank, National Association.

correspondent networks, and the dollar's role as the world's leading currency for international trade. For these reasons, many foreign banks hold accounts with them, and the Clearing House banks often act as the intermediary bank in EFTs. Moreover, the Clearing House, through an affiliate, operates the Clearing House Interbank Payment System ("CHIPS"), a funds-transfer system that serves over 50 U.S. and foreign banks and that each day processes over 250,000 payment orders worth an average of $1.25 trillion. Accordingly, proper administrative and judicial characterization and treatment of EFTs is critical to the Clearing House banks.[3]

STATEMENT OF THE CASE

This is an important case, with significant implications for international payments and trade and for the United States as the world's leading financial nation. The Second Circuit misinterpreted federal law to pre-empt the funds transfer laws—applicable in every state—that (a) decree that an originator such as TPI has no claim against an intermediary bank in a funds transfer (such as BNY in this case) because the intermediary bank never has any property of the originator, and therefore that (b) bar attachment of an EFT at an intermediary bank. The result of the Opinion is that banking customers are no longer assured of completing their EFTs without judicial interference, and the usefulness of such transfers through a U.S. bank has been undermined.[4]

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[3] As the Second Circuit itself earlier recognized in refusing to enforce a Rule B attachment, "the import of the decision only becomes clear upon realizing how common is the relationship between [the parties] in international trade, and how frequent, therefore, the need for a fund transfer through New York." *Reibor Int'l Ltd.* v. *Cargo Carriers (KACZ-CO.) Ltd.*, 759 F.2d 262, 264 (2d Cir. 1985) ("Reibor").

[4] Because banks' commercial customers often are engaged in shipping or receiving goods or equipment over water, the risk of attachments on EFTs is substantial. Indeed, unless the decision below is reversed, it will

Petitioner TPI and respondent Winter Storm Shipping, Ltd. ("Winter Storm") have a commercial dispute over a ship charter that is unrelated to the EFT here in question. Neither petitioner nor respondent has an account or other business relationship with The Bank of New York ("BNY"). Winter Storm nonetheless served four maritime orders of attachment under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B") for $361,621.58 of "TPI's assets" on each of BNY and other New York banks on June 28 and 29, 2001. Thereafter, on July 2, 2001, BNY as intermediary bank in an EFT received a payment order of over $1,000,000 from Bank of Ayudhya ("BA") in Thailand on which TPI was identified as the originator. BA had instructed BNY to pay this amount to Royal Bank of Scotland in London ("RBS") for further credit to an RBS account in connection with an unrelated transaction, but in view of the series of attachment orders BNY credited $361,621.58 to a suspense account and executed a payment order to RBS for the balance. Winter Storm then served another attachment order on BNY. The District Court found, in accordance with the law of New York, that the amount of a funds transfer at an intermediary bank is not the originator's property, and not subject to attachment under Rule B. 198 F. Supp. 2d 385, 392. Winter Storm appealed, and the Panel reversed by opinion filed on November 6, 2002 (310 F.3d 263). On January 13, 2003, the Second Circuit denied TPI's request that the Opinion be reconsidered.

EFTs are an integral, indeed essential, part of international trade and commerce. They provide a secure, efficient, expeditious and low-cost means for contracting parties to pay for goods and services and settle their financial transactions. EFTs in the U.S. alone average almost $3 trillion per day.

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be common practice for a plaintiff in a maritime action to "paper" every major bank in the U.S. with writs of attachment in the hope that one or more will "capture" an EFT originated by the defendant.

Recognizing the importance of this payment system, every state in the country and the Board of Governors of the Federal Reserve System have sought to assure its benefits by adopting a regulatory scheme that frees intermediary banks—those banks that are part of the payment chain, but are not banks of the originator or beneficiary—from concerns over attachment of EFTs.

The Opinion awarded Winter Storm rights against BNY that TPI itself could never assert, a result justified on the misconception that maritime law pre-empts basic commercial law in this regard. But there is no pre-emption, because there is no federal law that contradicts state law. Nothing in federal law compels the result that a party may attach funds at an intermediary bank in an EFT to satisfy a claim against the originator of the EFT, even though the originator has no relationship with the intermediary bank and no claim on the funds held at the intermediary bank. The Clearing House believes that review—and reversal—of the Second Circuit's decision is vital for several reasons.

First, the Opinion threatens substantial disruption to international payments and international trade. The Second Circuit itself previously has recognized the considerable potential for disruption that the law of maritime attachment could have on international banking practice, *see Reibor*, 759 F.2d at 268, and the uncertainty that would be created by placing intermediary banks in the middle of civil disputes. *Grain Traders, Inc.* v. *Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir. 1998) ("These are matters as to which an intermediary bank ordinarily should not have to be concerned and, if it were otherwise, would impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs."). Unless the decision is reversed, this very delay and increased cost would be the inevitable result, substantially curtailing the utility of funds transfers in both domestic and international transactions and, accordingly, causing a reduction in their use. Standard operating procedure for

every plaintiff in a maritime action would be to "paper" every major U.S. bank with writs of attachment in the hope that an EFT originated by the defendant would at that moment pass through one of those banks as intermediary. Such change—such regression—is unwarranted and unwelcome.

Second, the Opinion conflicts with applicable law, adopted in every state, that recognizes that a creditor (Winter Storm) of the originator (TPI) cannot attach EFT funds "because no property of the originator is being transferred," N.Y.U.C.C. § 4A-502, comment 4, and that prohibits an injunction or restraining order against an intermediary bank in the EFT process. N.Y.U.C.C. § 4A-503.[5]

The Opinion concludes that this consistent state law is pre-empted by the federal maritime law. It fails, however, to articulate any standard under which this Constitution-based pre-emption power is appropriately exercised. There is no explicit pre-emption, there is no occupation of the field of litigation, and there is no showing that the state law conflicts with any federal law. Instead, after stating that federal admiralty law regards a defendant's bank account to be property subject to Rule B attachment (27a), the Opinion then maintains, without any precedent, support or logic, that it was "TPI's funds [that were] in BNY's hands prior to their electronic transfer to RBS" and that they were the same as "funds held by BNY for the account of TPI" (27a).[6] This assertion is contrary to New York law (and the law of every

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[5] U.C.C. § 4-A-503 also has been adopted by the Board of Governors of the Federal Reserve System for its Fedwire system, *see* Federal Reserve System Regulation J, 12 C.F.R. Part 210. The Second Circuit thus has created a different federal rule for maritime attachments of EFTs on CHIPS or SWIFT, another major bank EFT system.

[6] Although the Opinion referred continually to "TPI's funds" (6a, 21a, 23a, n.7, 27a, 32a) "in Bank of New York's hands" (27a), repetition does not make it so. TPI had no claim against BNY, and BNY owed nothing to TPI.

other state), which says TPI had no property interest at BNY, and contrary to the circumstances found in every decision the Opinion cites, because here there were no bank accounts, no financial obligations, no goods or chattels, no bunkers or stores of the defendant to be attached. The Opinion simply deemed that "TPI's funds" were at BNY, and bootstrapped that erroneous finding into a jurisdictional basis for sustaining the attachment.[7]

Third, the Opinion conflicts with Supreme Court precedent. The Second Circuit disregarded this Court's holding in *Citizens Bank of Maryland* v. *Strumpf*, 516 U.S. 16 (1995), when it stated as its fundamental premise that "[t]here is no question that federal admiralty law regards a defendant's bank account as property subject to maritime attachment . . . ." (Opinion at 27a.) In *Strumpf*, this Court determined expressly that bank accounts are *not* the property of a depositor for purposes of the automatic stay provision of the bankruptcy code, but are merely promises to pay a depositor upon demand. Further, in contrast to a bank's promise to an accountholder, an intermediary bank in an EFT makes no promise to the EFT's originator, such as defendant TPI. Debits and credits posted by an intermediary bank that has no business relationship with a defendant in a maritime action are not property of that defendant subject to maritime attachment.

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[7] The Opinion's interpretation would mean that a Rule B attachment violates the Rules Enabling Act, 28 U.S.C. § 2072. The Rules Enabling Act, pursuant to which the Admiralty Rules are incorporated into the Federal Rules of Civil Procedure, contains a jurisdictional limitation requiring that any such rule "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). Because under the substantive law of New York the originator of an EFT has no interest in the transferred funds and the attachment of an EFT at an intermediary bank is expressly prohibited, the Second Circuit's reading of Rule B creates from whole cloth a substantive right, and is therefore prohibited by the Rules Enabling Act.

Fourth, the Opinion conflicts with the law of another circuit. Although the Second Circuit now has decreed that debits and credits, in which the defendant has no present or prospective rights, posted by an intermediary bank are subject to a Rule B attachment, the Sixth Circuit has held that the defendant must have a present interest in property at a bank at the time of attachment for that attachment to be valid. In *Union Planters Nat'l Bank* v. *World Energy Systems Assocs.*, 816 F.2d 1092 (6th Cir. 1987), the court affirmed the district court's decision to quash a Rule B attachment where the subject bank was "merely a conduit through which the transaction would pass." *Id.* at 1097. The expectation there that defendant later would have an interest was insufficient, as here the defendant's completed role as originator of the EFT is insufficient under applicable law to present any attachable interest at the intermediary bank. While the defendant in *Union Planters* had an expectation that it would receive payment under a letter of credit, here TPI had no such expectation. If TPI appeared at BNY, it could expect nothing; it likely was not even aware that BNY was serving as an intermediary bank.

Finally, the Opinion attempts to justify its outcome on the basis of a case concerning a federal statute authorizing seizure of drug sale *proceeds* from an intermediary bank. *See United States* v. *Daccarett*, 6 F.3d 37 (2d Cir. 1993). *Daccarett*, however, actually refutes the Opinion because it confirms that no property interest existed in TPI. Although the Opinion finds "significant guidance" in *Daccarett* (27a), that decision in fact rejected the claimants' assertion that they had property interests in the credits posted by the intermediary banks, and authorized the seizure of proceeds only under a specific federal statute, 21 U.S.C. § 881(b), that covered proceeds. That carefully limited ruling should not be bootstrapped into a general application to attachments in maritime disputes that puts at risk the otherwise uniform treatment of intermediary banks under state and federal law.

Cf. Reibor, 759 F.2d at 267 (noting courts' longstanding goal, when interpreting admiralty law, "to minimize disruptive divergences between state and federal law.").

For each of these reasons, the Clearing House respectfully requests that the Petition be granted.

ARGUMENT

Admiralty Rule B provides that "[i]f a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the *defendant's tangible or intangible property* . . . . in the hands of the garnishees named in the process." Rule B(1)(a) of the Admiralty Rules (emphasis added). It is undisputed that TPI "is not found within the district," and under applicable state law, uncontradicted by any federal law, the funds attached by Winter Storm at BNY, as an EFT intermediary bank, do not constitute TPI's "tangible or intangible property," attachable pursuant to Rule B.

In finding to the contrary, the Opinion ignored nearly every reference point the Second Circuit was provided.

I. The Opinion Conflicts With Applicable State Law.

The Opinion contradicts relevant state statutory law, and it purports to preempt that law on the basis that Rule B determines that credits on the books of an intermediary bank in an EFT constitute a defendant's funds that may be attached, regardless of state law establishing that the intermediary bank holds no property of the defendant, and consequently prohibiting such attachment. A fundamental flaw in the Opinion is that property interests are created under state law, *Butner* v. *United States*, 440 U.S. 48, 55 (1979), state law decrees that the defendant has no property interest in the credits posted at the intermediary bank, and no federal law contradicts that.

Although it is true that federal law generally governs questions concerning the validity of Rule B attachments, *see Maryland Tuna Corp.* v. *The MS Benares*, 429 F. 2d 307, 321 (2d Cir. 1970), courts have consistently referred to state law where "the precedent in federal admiralty law is . . . thin," as it is here. *Reibor*, 759 F.2d at 266. *See also Det Bergenske Dampskibsselskab* v. *Sabre Shipping Corp.*, 341 F.2d 50, 53 (2nd Cir. 1965) (relying on New York law where "there is no established admiralty doctrine . . . such as would reflect a predominant federal interest"). Reference to state law is particularly appropriate here because, as the Second Circuit previously noted, "a decision contrary to the general rule of the state might have disruptive consequences for the state banking system." *Reibor*, 759 F.2d at 266. ("New York being the site for multiple transactions in world commerce, the New York banking system is particularly vulnerable to such disruption.") (*Id.*) (citation omitted).

Article 4A of the U.C.C. governs wire transfers of funds in New York and the 51 other jurisdictions where it has been adopted. With respect to attaching an "originator's" (here TPI's) funds, the Article provides that a court may only restrain (1) a person from issuing a payment order to initiate a funds transfer; (2) an originator's bank from executing the payment order of the originator; or (3) the beneficiary's bank from releasing the funds to the beneficiary. *See* N.Y.U.C.C. § 4-A-503 ("Section 503"). A creditor cannot reach the amount of a funds transfer at any other point—including an EFT at an intermediary bank—because "no property of the originator is being transferred." *See* Official Comment 4, N.Y.U.C.C. § 4-A-502.

As applicable here, Section 503 means that there are only two places at which a funds transfer credit is attachable property under Rule B: first, the originator's bank, and only then if attachment occurs before the originator's bank has executed the originator's payment order; and second, the

beneficiary's bank, and only then if attachment occurs before the funds are released or paid to the beneficiary. "In particular, intermediary banks are protected," *see* Official Comment, N.Y.U.C.C. § 4-A-503, as the Opinion concedes. *See* Opinion at 32a.

Rule B undeniably authorizes attachment of a defendant's "property," but it does not purport to determine what property is. That definition is appropriately left to the states. *Butner* v. *United States*, *supra*, 440 U.S. at 55. And the states' unanimous conclusion that there is no property right of an originator at an intermediary bank is strongly supported by common sense. It is beyond dispute that TPI could not have gone to BNY and demanded that it be paid the amount of the EFT from BA, or the amount due to RBS. Indeed, TPI had no rights or claim whatsoever against BNY. How then can plaintiff have a right greater than defendant itself did?

In addition to having been adopted by fifty-two jurisdictions, Article 4A of the U.C.C., including Sections 502 and 503, has been adopted by the Board of Governors of the Federal Reserve System by regulation, and thus is federal law. *See* Federal Reserve System Regulation J, 12 C.F.R. Part 210. *See also* 32 I.L.M. 587 (1993) (reproducing United Nations Commission on International Trade Law's model law on cross-border credit transfers closely resembling Article 4A). Although the Federal Reserve's adoption of Article 4A expressly applies only to funds transfers through the Federal Reserve Banks' Fedwire system, the official comment accompanying the issuance of Part 210 makes clear that one of the primary goals of the regulation adopting Article 4A was uniformity in the law applicable to all funds transfers. *See* 55 Fed. Reg. 40792 (Oct. 5, 1990). *Cf. Grain Traders, Inc.* v. *Citibank, N.A.*, 160 F.3d at 102 ("One of Article 4-A's primary goals is to promote certainty and finality so that 'the various parties to the funds transfer [will] be able to predict risk with certainty, to insure against risk, to adjust operational

and security procedures, and to adjust price transfer services appropriately.'"). The Opinion's disregard of Regulation J, which it never mentions, would create precisely the inconsistent treatment of materially identical wire transfers that the Federal Reserve Board sought to avoid in adopting Regulation J.

II. The Opinion Violates The Rules Enabling Act, 28 U.S.C. § 2072.

Admiralty Rule B is a rule of procedure, intended to set forth the process to be followed in maritime attachments. It is now part of the Federal Rules of Civil Procedure, adopted under the authority of the Rules Enabling Act, 28 U.S.C. § 2072, and, like all federal rules, is recommended by the Advisory Committee on Civil Rules and adopted in accordance with the conventions and limitations of the Rules Enabling Act. Those conventions and limitations were violated here.

As a procedural rule, Rule B is subject to the Rules Enabling Act's jurisdictional limitation requiring that the Rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *cf. Semtek Intl. Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503-4 (2001) (acknowledging violation of the Rules Enabling Act if Federal Rule of Civil Procedure 41(b) extinguished a right provided for under California law); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842 (1999) (adopting a "limiting construction" of Federal Rule of Civil Procedure 23(b)(1)(B) in order to "minimiz[e] potential conflict with the Rules Enabling Act, and [to] avoi[d] serious constitutional concerns"). Rule B is not unique in this regard; each of the Federal Rules of Civil Procedure is subject to this limitation. *Cf. Fontenot* v. *Roach*, 120 F. Supp. 788 (E.D. Tenn. 1954) (holding that the federal rules govern procedure only and not the substantive rights of persons who invoke the jurisdiction of the federal courts).

Accordingly, a court must not apply a federal rule if its application would interfere with a party's substantive rights, because such application would violate the Rules Enabling Act. *See, e.g., Douglas* v. *NCNB Texas Nat'l Bank*, 979 F.2d 1128 (5th Cir. 1992). As applicable here, the Rules Enabling Act prohibits a court from applying Rule B or permitting maritime attachment pursuant to it if such attachment would "abridge, enlarge or modify" a substantive right under state law.

In the ruling below, rights were not merely abridged or modified by a federal rule of procedure; rather Rule B was interpreted both to create rights out of whole cloth for the benefit of plaintiff and to revolutionize the rights and obligations of intermediary banks. Under comment 4 to N.Y.U.C.C. § 4-A-502, the originator of an EFT has no interest in the funds transferred,[8] and N.Y.U.C.C. § 4-A-503 permits attachment of a funds transfer credit only at the originator's bank or at the beneficiary's bank; it prohibits attachment at an intermediary bank. *See* Official Comment, N.Y.U.C.C. § 4-A-503 ("In particular, intermediary banks are protected."). In permitting a maritime attachment at an intermediary bank—which is plainly neither an originating nor a beneficiary bank—on the basis that "TPI's funds" were at BNY, the Second Circuit has created a property interest in TPI, where the substantive law of the state says there is not one. The Opinion then used this creation of rights to justify interference with the rights of an intermediary bank in an EFT, which is also prohibited under applicable law. The Opinion's interpretation of Rule B is impermissible under the Rules Enabling Act.

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[8] *See* Prefatory Note to U.C.C. Art. 4A (1989), 2B U.L.A. Pt. II, 9 (2002) ("no property right of [the originator] is actually transferred . . . .").

III. The Opinion Conflicts With Supreme Court Precedent.

The Second Circuit's Opinion is fundamentally flawed because its underlying premise is factually incorrect and has been rejected by this Court. Contrary to the Opinion's assertion that "[t]here is no question that federal admiralty law regards a defendant's bank account as property subject to maritime attachment" (Opinion at 27a), and putting to one side the fact that here the defendant had no bank account at BNY, the Supreme Court has determined that bank accounts are *not* the property of a depositor, but are merely promises to pay a depositor upon demand. *See Citizens Bank of Maryland* v. *Strumpf*, 516 U.S. 16 (1995).

In *Strumpf*, in the analogous context of determining the meaning of "property" under the automatic stay provisions of the bankruptcy code, 11 U.S.C. §§ 362(a)(3) and (a)(6), the Supreme Court examined the "false premise" that a bank's administrative hold on a deposit account was an "exercise [of] dominion over property that belonged to the respondent." 516 U.S. at 21. In concluding that a bank account was *not* "money belonging to the depositor and held by the bank," the Court noted that an account "consists of nothing more or less than a promise to pay, from the bank to the depositor." *Id.* *See also United States* v. *Butterworth-Judson Corp.*, 267 U.S. 387, 394 (1925) (holding that money deposited in a bank account is the bank's property, the deposit creating a debt owed by the bank to the depositor). Accordingly, the Supreme Court held that the bank's refusal to turn over the contents of an account to a bankruptcy estate "was neither a taking of possession of respondent's property nor an exercising of control over it, but merely a refusal to perform its promise." 516 U.S. at 21.

If the Second Circuit had accepted that funds on deposit at a bank are not property of an accountholder but only a promise to pay, it would have been even clearer that debits

and credits posted by an intermediary bank that has no relationship with a defendant in a maritime action cannot be property of that defendant. The intermediary bank makes no promise, explicit or implicit, to pay the originator. And even if a bank's promise to pay a defendant can be attached under Rule B, a promise to perform by BNY made not to the defendant but to an originator's bank in Thailand or a beneficiary's bank in London is not defendant's "property"—*i.e.*, not a "seizable res"—within the meaning of Rule B.

That result should have been obvious here because BNY held no property of TPI, had made no promise to TPI and owed no obligation to TPI. It makes no difference that BNY segregated an amount of funds some days after the multiple maritime attachments began, because that act does not create additional rights in any party. *See Daccarett*, 6 F.3d at 51-52 (freezing of funds does not afford customer status to claimants).

IV. The Opinion Conflicts With The Law Of The Sixth Circuit.

The Opinion also conflicts with the law of another circuit.

The Second Circuit determined that the funds attached by Winter Storm at BNY, as an EFT intermediary bank, somehow constituted TPI's "tangible or intangible property" attachable pursuant to Rule B, even though TPI had no interest in those funds at the time of attachment. The Opinion's apparent premise is that because the defendant originated the EFT, that former interest in funds at the originating bank is a sufficient property interest to justify attachment of the EFT at an intermediary bank. The Sixth Circuit disagrees. In *Union Planters Nat'l Bank* v. *World Energy Systems Assocs.*, 816 F.2d 1092 (6th Cir. 1987), even where an anticipated payment under a letter of credit was to be made to the defendant, the Sixth Circuit affirmed the district court's decision to quash a Rule B attachment where

the subject bank was "merely a conduit through which the transaction would pass." *Id.* at 1097. It found that expectations that defendant would later benefit from property passing through an intermediary bank are not subject to attachment under Admiralty Rule B.

In *Union Planters*, the defendant (WESA), a coal distributor, was the beneficiary of a letter of credit issued by a coal purchaser's Taiwanese bank. Pursuant to the letter, WESA's bank (Union Planters) would credit funds to WESA's account as soon as WESA presented certain documents reflecting that the shipment of coal had been made in accordance with the plaintiff's and defendant's underlying contract. One of the defendant's judgment creditors served a writ of attachment on Union Planters, seeking to attach all of WESA's assets under its control. The bank responded to the writ by stating that, at the time the writ was served, it had no attachable assets belonging to the defendant. The district court agreed, and rejected the creditor's argument that there were funds available under the letter of credit that belonged to WESA because WESA had shipped the coal in accordance with the underlying contract.

On appeal, the Sixth Circuit affirmed. The court stressed that however certain WESA's eventual entitlement to the funds, the funds could not be deemed its property until the appropriate confirmatory documents were tendered to Union Planters. *Id.* at 1097-98. The court noted that "the federal writ of maritime attachment is the equivalent of one cast of the net; if the fish are not running as of the date of service, the net is returned empty to court." Id at 1098. *See also Ocean Focus Ltd.* v. *Naviera Humboldt*, 962 F. Supp. 1481 (S.D. Fla. 1996) (granting motion to quash writ of attachment of line of credit).

The circumstances here present even less support for an attachment. Winter Storm "cast its net" over BNY, but BNY held no funds payable to TPI. The last act of TPI, as

originator, was to order BA, its Thai bank, to cause RBS to pay RBS' customer. At no time did BNY have any obligation to pay TPI, and TPI never had any claim against BNY. Under the Sixth Circuit's opinion in *Union Planters* then, the funds here were not properly attached.

V. The Opinion Is Ill-Founded.

The Opinion is misguided and, if permitted to stand, presents a dangerous precedent. In lieu of applying on-point federal and state authority, and thereby avoiding a direct conflict with state law, the Opinion concluded instead that federal law has "fashion[ed] a rule in this Circuit that EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a)" (Opinion at 32a). There is, however, no such federal rule regarding Rule B. The Opinion instead relies by attempted analogy on a single materially distinct case, *United States* v. *Daccarett*, *supra*. The Opinion extracted *Daccarett*'s limited holding regarding EFTs in the context of the federal war on drugs—one "that only obliquely graze[s] the issue before us," *Reibor*, 759 F.2d at 265—and applied it here to create a sweeping and overbroad rule. *Daccarett* does not support the Opinion's reading.

In *Daccarett*, associates of a Colombian drug cartel, recently arrested, sought to move funds located in certain European banks to Colombia before they could be confiscated. Accordingly, they originated a series of EFTs, some of which used New York banks as intermediaries. The United States government seized some $12 million of these funds pursuant to the Drug Abuse Prevention & Control Act, 21 U.S.C. § 881(b) ("Drug Control Act"), including by serving Admiralty Rule C warrants on New York-based intermediaries. The Colombian beneficiaries of the EFTs contested the seizures.

Among the arguments advanced by the beneficiaries in *Daccarett* was that "EFTs are not seizable properties for

purposes of the civil forfeiture statutes because they are merely electronic communications." *Id.* at 54. The *Daccarett* court rejected this argument, holding that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res *under the forfeiture statutes*." *Id.* at 55 (emphasis added).

Daccarett's holding is quite narrow; the court held that proceeds of illegal drug transactions on deposit can be subject to forfeiture *under the Drug Control Act*. The Drug Control Act permits the Justice Department to effect the forfeiture of "moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance [as well as] *all funds traceable to such an exchange*." 21 U.S.C. § 881(a)(6). Accordingly, the *Daccarett* court did not hold that funds on deposit at an intermediary bank were the *property* of any parties subject to arrest,[9] but only that EFT credits are subject to arrest as proceeds "traceable to" illegal drug transactions. The Admiralty Rules contain no analogue to the Drug Control Act's provision for "traceable funds." *Daccarett* thus sheds no light on the critical question here of whether the EFT funds residing in the intermediary bank constitute defendant's property.

The *Daccarett* court contemplated a seizure in connection with a criminal action and, more generally, as part of a larger federal plan designed expressly to provide an economic incentive for policing agencies to seize and forfeit property believed to have a connection to illegal drugs. That federal plan, as embodied in the Drug Control Act, extends beyond

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[9] To the contrary, the court rejected the claimants' Fourth Amendment objections to seizure of financial records at the banks on the basis that claimants had no protectable interest in the records because they were not customers of the intermediary banks. 6 F.3d at 50.

civil statutes and permits not only the seizure of property but funds traceable to that property. *See generally* Marc B. Stahl, "Asset Forfeiture, Burdens of Proof and the War on Drugs," 83 Journal of Criminal Law and Criminology 274 (1992). The Clearing House does not advocate limiting the United States government's ability to police or protect its citizenry from the impact of illegal drugs, and acknowledges that liberal seizure standards may aid in that effort. However, the same incentives and policy motivations do not exist in conventional civil contract disputes such as this, and the Opinion's broad application of seizure under the Drug Control Act is therefore not warranted.

VI. The Opinion Is Bad Policy And Threatens Substantial Disruption To Banking Practice.

Funds transfers have become an integral component of business transactions, as they facilitate the efficient, high-speed and low-cost transfers of funds. *See* 84 Fed. Res. Bull. 25, Statement by Edward W. Kelley, Jr., Member, Board of Governors of the Federal Reserve System, Before the Committee on Banking and Financial Services, U.S. House of Representatives, Nov. 4 1997 ("The current average total daily value of Fedwire funds transfers is approximately $1.1 trillion."); *Banque Worms* v. *BankAmerica Int'l*, 77 N.Y.2d 362 (1991) (noting that transfer volumes reach $1 trillion daily). Present daily volumes average close to $3 trillion.[10]

Permitting maritime attachments of intermediaries in EFT transactions would inhibit the free flow of funds among financial institutions, creating uncertainty as to rights and liabilities and exposing intermediaries to the continuous risk of litigation from originators, beneficiaries, sending banks, receiving banks and claimants against all of them. It could

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[10] *See* www.federalreserve.gov/PaymentSystems/FedWire/annual.pdf (FedWire); www.nacha.org/news/pressreleases/2003/PR042803/pr042803.htm (automated clearing houses); www.chips.org/stats.htm (CHIPS).

require intermediaries to more closely coordinate their legal and business departments on a second by second basis, all of which would ultimately impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs.

Further, as the District Court recognized, 198 F. Supp. 2d at 391, n. 7, upholding the attachment here effectively will create a rule that "every time a foreign maritime entity initiates a wire transfer abroad, it must foresee attachment in New York and suit in the United States." Thus, the principle urged by the Opinion will have a substantial adverse effect on a bank's ability to participate in the funds transfer payment system and the ability of businesses to transfer funds efficiently, and may serve to chill the use of intermediary banks in the United States, particularly in the Second Circuit.

CONCLUSION

For each of the above reasons, the Petition should be granted.

Respectfully submitted,

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